(24,907)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 239.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MICHAEL TONSELLITO, AN INFANT, WHO SUES BY JAMES TONSELLITO, HIS NEXT FRIEND.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

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a New Jersey Court of Errors and Appeals.

MICHAEL TONSELLITO, an Infant, Who Sues, etc., Plaintiff-Appellee,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant-Appellant.

Action at Law. On Appeal from Hudson Circuit Court.

JAMES TONSELLITO, Plaintiff-Appellee,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant-Appellant.

Action at Law. On Appeal from Hudson Circuit Court.

STATE OF CASE.

Alexander Simpson, Attorney for Plaintiff-Appellee.
Vredenburgh, Wall & Carey, Attorneys for Defendant-Appellant.

Aug. 14, 1915. [Stamp illegible.]

1 *Notice of Appeal.*

(Filed November 13, 1914.)

Hudson County Circuit Court.

MICHAEL TONSELLITO, an Infant, Who Sues, etc., Plaintiff-Appellee,
vs.
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant-Appellant.

On Appeal.

To Alexander Simpson, Esq., Attorney for Plaintiff-Appellee:

Take Notice: that the defendant appeals from the whole of the judgment entered in this cause in the Hudson County Circuit Court, to the Court of Errors and Appeals, in the last resort in all causes of the State of New Jersey.

Dated November 11, 1914.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant-Appellant.

Service is hereby acknowledged of a copy of within notice of appeal and consent to the filing of the recognizance on appeal, as within time.

ALEX. SIMPSON,
Att'y for P'tiff-Ap-ellee.

2 *Grounds of Appeal.*

(Filed February 15, 1915.)

New Jersey Court of Errors and Appeals.

MICHAEL TONSELLITO, an Infant, Who Sues by JAMES TONSELLITO, His Next Friend, Plaintiff-Appellee,
vs.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant-Appellant.

On Appeal.

Grounds of Appeal.

The above named Defendant-Appellant, the New York Central & Hudson River Railroad Company, assigns the following grounds of appeal from the judgment of the Hudson Circuit Court in above cause:

1. Because the trial court, at the close of the plaintiff's case, refused to grant a nonsuit against the plaintiff, when thereunto moved by the defendant.

2. Because the trial court, at the close of the whole case, refused to direct a verdict in favor of defendant and against plaintiff, when thereunto moved by defendant.

3. Because the trial court refused to find as a matter of law, that, at the time of plaintiff's injury, plaintiff and defendant were not engaged in interstate commerce.

4. Because the jury disregarded the request of the trial court to return an answer to the following question:

3 "Q. At what point do you find, as a matter of fact, the plaintiff Michael Tonsellito attempted to board the engine, at the time of the occurrence of the injury complained of?"

but returned instead the following evasive and unintelligible answer:

"And in answer to the question as to where Michael attempted to board the engine, say that they find that he attempted to board the engine at the air-pipe";

and the trial court refused to grant a new trial upon application of of the defendant because of such failure.

The following questions were admitted:

5. To the witness Edward J. Clifford:

"Q. In these yards where you have had your experience, what is the condition as to whether the road-bed is level with the ties, or not, at points near switches and at points where it is customary to get on and off trains?"

6. To witness Edward J. Clifford:

"Q. Have you ever found any of these yards where you have

worked, filled in or otherwise, the ground two feet from measurement, from the top of the rail down to the ground?"

7. To the witness George F. Hilliard:

"Q. In those yards, at the time that you worked there, what was the condition of the road-bed in the yards, with reference to the rail? Was it even with the ties, or was it down two feet lower than the ties?"

8. To the witness Charles H. McKee:

"Q. What kind of oil did you have in the store-house?"

4 9. To the witness John Johnson:

"Q. That was not the question, sir. I asked you if you know of any other siding of the New York Central that had the ground two feet below the top of the ties?"

10. To the witness Eugene P. Kraemer:

"Q. Now, Mr. Hartpence has not given you any measurement since the last trial, to make any measurements between the curved water-pipe and the switch?"

11. To the witness Kate L. Tully:

"Q. Page 219: Do you remember being asked: 'What time did he come out of the ether?' and your answer: '5 P. M.', at the last trial?"

12. To the witness Kate L. Tully:

"Q. Then you testify at the last trial, being asked the question by the court: 'When was the ether administered? Does your record show that? Does it show when the ether was administered? A. Was taken to the operating-room; does not show the exact minute; shows he came in at 1:20 and he came from the Emergency-room at 1:20, and he was bathed and undressed by Dr. Fendrick and taken to the operating-room and operated on by Dr. Fendrick'; did you so testify at the last trial?"

"A. That could not have been correct."

"Q. Did you so testify?

"A. No, I did not."

Mr. Hartpence: I object.

"A. I did not testify to anything."

5 13. To the witness Myles O. Gibson:

"Q. How would the engine get it? It would not go up itself, would it? On this day?"

14. To the witness Dr. Edward Fendrick:

"Q. Assuming that this boy is in good health, what danger would there be in performing this operation that Dr. Arlitz speaks of?

15. To the witness Dr. Louis Poole:

"Q. Would this man be able to run an automobile as well as he is able to walk around on this stump, as you say he is, without any artificial foot?"

16. To the witness Dr. Louis Poole:

"Q. Always do that when you write figures, first write the figures, when you are concerned about the time, then look at the clock and see it is wrong, and change the figure?"

The following questions overruled:

17. To the witness James Tonsellito:

"Q. How late did he work that day?"

18. To the witness Martin F. O'Connor:

"Q. You do not do that sort of thing in the railroad service, do you?"

19. Because the trial court refused to strike out the testimony of the witness Martin F. O'Connor, relating to the time-card of Michael Tonsellito, offered in rebuttal by plaintiff.

6 20. The court refused to charge the jury:

1. If the roadbed of the defendants at the place and time of the accident was similar in construction to the similar types of roadbed of other standard railroads in th-s locality such as the Lehigh Valley Railroad, The Delaware, Lackawanna & Western Railroad and the Pennsylvania Railroad companies, and there was no greater distance from the roadbed itself to the top of the rails at the place and time of the accident than on such similar types of railroad, then no negligence can be attributed to defendant because of such distance then existing at such time and place of the accident.

2. Plaintiff, Mic*a*hel Tonsellito's damages in this case are limited to legal compensation for his pain and suffering, the testimony being undisputed that plaintiff was not emancipated at the time of his alleged injury, and there being no proof in the case of any interference with plaintiff's earning capacity in the future because of said injury.

3. If the jury believe that the condition of the defendant's roadbed at the time and place of the alleged injury to plaintiff, Michael Tonsellito, occurred (even though defective in the sense of the statute under which this action is brought, which of course is denied by defendant) was as plain and obvious to the said plaintiff as to the defendant and its agents, then plaintiff must be taken to have assumed the risks of his employment in this respect, and cannot recover against the defendant on that phase of this action.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

7 (Indorsed:) New Jersey Court of Errors and Appeals. Michael Tonsellito, an infant, who sues by James Tonsellito, his next friend, Plaintiff-Appellee, vs. The New York Central & Hudson River Railroad Company, Defendant-Appellant. On Appeal. Grounds of Appeal. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J. Service of a true copy of within Grounds of Appeal is acknowledged this 13th day of February 1915, as of legal time. Alex. Simpson, Att'y for Pl'iff.

8 *Recognizance.*

(In Usual Form.)

Complaint.

(Filed Dec. 29, 1913.)

Hudson County Circuit Court.

MICHAEL TONSELLITO, an Infant, Who Sues by JAMES TONSELLITO, His Next Friend, Plaintiff,
vs.
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant.

Action of Law.

The plaintiff, Michael Tonsellito, an infant, who sues by James Tonsellito, his next friend, residing at No. 647 5th Street, New Durham, Hudson County, New Jersey, says that:

1. The defendant above named is now and was at all times hereinafter mentioned a foreign corporation, and was at all times hereinafter mentioned engaged in interstate commerce between the State of New York and the State of New Jersey, at Weehawken, in the County of Hudson, and the State of New Jersey.

2. The plaintiff, Michael Tonsellito, on the 23d day of June, 1912, was the servant of the defendant, and the said defendant at that time and at all times during which the plaintiff was in its service was a common carrier by railroad engaged in commerce between the State of New York and the State of New Jersey.

9 3. The plaintiff, on the 23d day of June, 1912, while in the service of the said defendant as a common carrier by railroad so engaged in interstate commerce, was injured at Weehawken in the County of Hudson aforesaid by reason of the negligence of the defendant, resulting in whole or in part from the negligence of its officers, agents and employes, and by reason of defect and insufficiency, due to the negligence of the defendant in a certain locomotive, track and roadbed then and there used by the said defendant in interstate commerce as aforesaid.

4. The negligence of the defendant aforesaid consisted in this: That it did not use reasonable care to have its roadbed in a safe condition, but, on the contrary, the roadbed at the place where the plaintiff was injured was so unskillfully and improperly made and graded that the said roadbed was below the ties of the railway track on which there was a certain locomotive upon which the plaintiff was engaged, and the plaintiff, who was a minor of the age of 16 years, had not been properly warned and instructed by the defendant of certain hidden dangers connected with the said track and roadbed, which were not obvious to him by reason of his youth

and inexperience, which defect has been before described in the occurring thereof, which produced a condition which was difficult and dangerous, although not obvious to a person of the inexperience and youth of the plaintiff, when mounting upon locomotives at said place, and the plaintiff while so engaged in the service of the defendant, attempted to mount the said locomotive, by reason of the negligence of the defendant aforesaid, and by reason of the negligence of the defendant aforesaid, and by reason of the further negligence of the person in charge of said locomotive, who did not give plaintiff a reasonable opportunity to board the same, but started the said locomotive in motion, the plaintiff fell from the locomotive, and by reason thereof his left foot was cut and mashed so that he lost the same.

5. The plaintiff by reason of the said accident lost his foot and suffered great pain and injury.

The plaintiff demands $25,000.00 damages.

ALEX. SIMPSON,
Attorney of Plaintiff.

Amended to Par. 3 of Complaint.

(Allowed on the Trial, May 24, 1914.)

Mr. Simpson: Then I will ask to make this amendment and set up "that the plaintiff was employed on a locomotive, which locomotive was a locomotive engaged in moving a train from New Jersey into the state of New York and that he was employed on the locomotive in preparing that locomotive for the transportation of the train and also in getting with that locomotive a barrel of oil, which barrel of oil was to be taken from the state of New Jersey into the state of New York, and while so engaged on that locomotive in the capacity of an extra fireman and in preparing that locomotive to be attached to the train and in obtaining the barrel of oil to be taken out of the state of New Jersey he was injured by the negligence set up in the complaint."

The Court: You may have permission to so amend, and the defendant's answer to paragraph three as originally made will also remain the answer and be the answer to paragraph three as amended.

Answer.

(Filed January 23, 1914.)

Hudson County Circuit Court.

ICHAEL TONSELLITO, an Infant, Who Sues by JAMES TONSELLITO, His Next Friend, Plaintiff,
vs.
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant.

Action at Law.

Defendant, a corporation organized and existing under the laws the State of New York, says that—

1. It denies Paragraph 1 of the Complaint.
2. It denies Paragraph 2 of the Complaint.
3. It admits so much of Paragraph 3 of the Complaint as alleges at the plaintiff was injured at Weehawken, in the County of dson, on the 23rd day of June, 1912; but denies all the rest and nainder of said Paragraph 3 and the allegations contained therein.
4. It denies Paragraph 4 of the Complaint.
5. It neither admits nor denies Paragraph 5 of the Complaint, having sufficient knowledge thereof to form a belief, but leaves intiff to his proof thereof.

Second Defense.

. Plaintiff, Michael Tonsellito, contributed to his injury by his n negligence, in that he attempted to get upon or aboard a moving engine at the time of his alleged injury, although warned not to do so by the servants, agents and employes of said defendant, which was an obviously unsafe, improper dangerous act on the part of plaintiff.

Third Defense.

. Plaintiff, Michael Tonsellito, at the time when and place where alleged injury occurred, was engaged in the performance of an which formed no part of his employment, and in the perform- e of which he was a mere volunteer, assuming the risks attendant reupon, to whom the defendant owed no legal duty as alleged in Complaint.

Third Defense.

. Plaintiff, Michael Tonsellito, was not employed or engaged in r-state commerce at the time when and place where his said ged injury occurred.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Objection in Point of Law.

Defendant will object, as matter of law, that said complaint is insufficient and should be stricken out, in that it does not allege or aver that, at the time when and place where said alleged injury to plaintiff, Michael Tonsellito, occurred, said plaintiff was engaged or employed in intercommerce, and that therefore said Hudson County Circuit Court is without jurisdiction to hear and determine said action.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

13 (Indorsed:) Hudson County Circuit Court. Michael Tonsellito, *and* infant, who sues by James Tonsellito, his next friend, Plaintiff, vs. New York Central and Hudson River Railroad Company, Defendant. Action at Law. Answer. Vredenburgh, Wall & Carey, Att'ys for Defendant, 1 Exchange Place, Jersey City, N. J. I consent to the filing of within Answer as of time, and hereby acknowledge service of a copy of the same. January 21, 1914. (Signed) Alex. Simpson, Att'y for Pl't'ff.

14 *Reply.*

(Filed January 26, 1914.)

The plaintiff for reply to the special matters set up by the defendant in the above entitled cause in its answer denies the truth of the matters alleged under the "Second," "Third," and "Third" defense, the defendant having entitled two defenses the "Third Defense."

The plaintiff also denies the sufficiency in point of law of the objection in point of law raised by the answer of the defendant.

ALEX. SIMPSON,
Attorney for Plaintiff.

Judgment.

(Entered November 4, 1914.)

This action was tried before Judge Luther A. Campbell, with a jury at the Hudson Circuit on November 4th, 1914.

The cause having been heard and submitted to the jury, they returned their verdict as follows: They say that they find for the plaintiff on occasion of the premises at the sum of six thousand five hundred dollars ($6,500.).

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of six thousand five hundred dollars ($6,500.) and his costs which are taxed at the sum of sixty-nine dollars and sixty-five cents ($69.65) making in the whole the sum of six thousand five hundred and sixty-nine dollars and sixty-five cents ($6,569.65).

Judgment entered this November 4th, 1914.

LUTHER A. CAMPBELL, *Judge.*

Attest:
JOHN F. CROSBY, *Clerk.*

15 *Certificate.*

The answer of Luther A. Campbell, Esquire, Judge of the Circuit Court, holden in and for the County of Hudson, and within named, the record and proceedings of the plaint whereof mention is within made with all things touching the same, I send to the Judges of our Court of Errors and Appeals, of the last resort of all causes at Trenton, N. J., at the day and year within contained, in a certain appeal to this writ annexed as within, I am commanded.

LUTHER A. CAMPBELL, *Judge.*

16 *Notice of Appeal.*

(Filed November 13, 1914.)

Hudson County Circuit Court.

JAMES TONSELLITO, Plaintiff-Appellee,
vs.
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant-Appellant.

On Appeal.

To Alexander Simpson, Esq., Attorney for Plaintiff-Appellee:

Take Notice: That the defendant appeals from the whole of the judgment entered in this cause in the Hudson County Circuit Court, to the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey.

Dated November 11, 1914.

VREDENBURGH, WALL & CAREY,
Attorneys for Def't-Appellant.

Service of a copy of within notice of appeal is hereby acknowledged, and consent to the filing of the recognizance on appeal, as within time.

ALEX. SIMPSON,
Att'y of Pl't'ff-Appellee.

17 *Grounds of Appeal.*

(Filed February 15, 1915.)

New Jersey Court of Errors and Appeals.

JAMES TONSELLITO, Plaintiff-Appellee,
vs.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant-Appellant.

On Appeal.

Grounds of Appeal.

The above named Defendant-Appellant, the New York Central & Hudson River Railroad Company, assigns the following grounds of appeal from the judgment of the Hudson Circuit Court in above cause:

1. Because the trial court, at the close of the plaintiff's case, refused to grant a nonsuit against the plaintiff, when thereunto moved by the defendant.

2. Because the trial court, at the close of the whole case, refused to direct a verdict in favor of defendant and against plaintiff, when thereunto moved by defendant.

3. Because the trial court refused to find as a matter of law, that, at the time of plaintiff's injury, plaintiff and defendant were not engaged in interstate commerce.

4. Because the jury disregarded the request of the trial court to return an answer to the following question:

18 "Q. At what point do you find, as a matter of fact, the plaintiff Michael Tonsellito attempted to board the engine, at the time of the occurrence of the injury complained of?"

but returned instead the following evasive and unintelligible answer:

"And in answer to the question as to where Michael attempted to board the engine, say that they find that he attempted to board the engine at the air-pipe";

and the trial court refused to grant a new trial upon application of the defendant because of such failure.

The following questions were admitted:

5. To the witness Edward J. Clifford:

"Q. In these yards where you have had your experience, what is the condition as to whether the road-bed is level with the ties, or not, at points near switches and at points where it is customary to get on and off trains?"

6. To the witness Edward J. Clifford:

"Q. Have you ever found any of these yards where you have worked, filled in or otherwise, the ground two feet from measurement, from the top of the rail down to the ground?"

7. To the witness George F. Hilliard:

"Q. In those yards, at the time that you worked there, what was the condition of the road-bed in the yards, with reference to the rail? Was it even with the ties, or was it down two feet lower than the ties?"

19 8. To the witness Charles H. McKee:

"Q. What kind of oil did you have in the store-house?"

9. To the witness John Johnson:

"Q. That was not the question, sir. I asked you if you knew of any other siding of the New York Central that had the ground two feet below the top of the ties?"

10. To the witness Eugene P. Kraemer:

"Q. Now, Mr. Hartpence has not given you any measurement since the last trial, to make any measurements between the curved water-pipe and the switch?"

11. To the witness Kate L. Tully:

"Q. Page 219: Do you remember being asked: 'What time did he come out of the ether?' and your answer: '5 P. M.,' at the last trial?"

12. To the witness Kate L. Tully:

"Q. *The* you testify at the last trial, being asked the question by the court: 'When was the ether administered? Does your record show that? Does it show when the ether was administered? A. Was taken to the operating-room; does not show the exact minute; shows he came in at 1:20 and he came from the emergency room at 1:20, and he was bathed and undressed by Dr. Fendrick and taken to the operating-room and operated on by Dr. Fendrick'; did you so testify at the last trial.

"A. That could not have been correct.

"Q. Did you so testify?

"No, I did not."

20 Mr. Hartpence: I object.

"A. I did not testify to anything."

13. To the witness Myles O. Gibson:

"Q. How would the engine get it? It would not go up itself, would it? On this day?"

14. To the witness Dr. Edward Fendrick:

"Q. Assuming that this boy is in good health, what danger would there be in performing this operation that Dr. Arlitz speaks of?

15. To the witness Dr. Louis Poole:

"Q. Would this man be able to run an automobile as well as he is able to walk around on this stump, as you say he is, without any artificial foot?"

16. To the witness Dr. Louis Poole:

"Q. Always do that when you write figures, first write the figures, when you are concerned about the time, then look at the clock and see it is wrong, and change the figure?"

The following questions were overruled:

17. To the witness James Tonsellito:

"Q. How late did he work that day?"

18. To the witness Martin F. O'Connor:

"Q. You do not do that sort of thing in the railroad service, do you?"

19. Because the trial court refused to strike out the testimony of the witness Martin F. O'Connor, relating to the time-card of Michael Tonsellito, offered in rebuttal by plaintiff.

21 20. The Court refused to charge the jury:

1. If the roadbed of the defendants at the place and time of the accident was similar in construction to the similar types of roadbed of other standard railroads in this locality, such as the Lehigh Valley Railroad, The Delaware, Lackawanna & Western Railroad and the Pennsylvania Railroad companies, and there was no greater distance from the roadbed itself to the top of the rails at the place and time of the accident than on such similar types of railroad, then no negligence can be attributed to defendant beca-se of such distance then existing at such time and place of the accident.

2. Plaintiff, Michael Tonsellito's damages in this case are limited to legal compensation for his pain and suffering, the testimony being undisputed that plaintiff was not emancipated at the time of his alleged injury, and there being no proof in the case of any interference with plaintiff's earning capacity in the future because of said injury.

3. If the jury believe that the condition of the defendant's roadbed at the time and place of the alleged injury to plaintiff, Michael Tonsellito, occurred (even though defective in the sense of the statute under which this action is brought, which of course is denied by defendant) was as plain and obvious to the said plaintiff as to the defendant and its agents, then plaintiff must be taken to have assumed the risks of his employment in this respect, and connot recover against the defendant on that phase of this action.

21. The court charged the jury as follows:

If, however, you find that your verdict should be for Michael, then you may find for the father * * *

22 Therefore if, because of these injuries, and which you — are the result of negligence of the defendant, company, the father meets with a loss, or is not put in that position or left in that position where he has the benefit of the son's services, or, what we commonly mean, will not have the benefit of the dollar and cent return for that service, then he is entitled to have at your hands whatever you find that loss will be.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

23 (Indorsed:) New Jersey Court of Errors and Appeals. James Tonsellito, Plaintiff-Appellee, vs. The New York Central and Hudson River Railroad Company, Defendant-Appellant. On Appeal. Grounds of Appeal. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J. Service of a true copy of within Grounds of Appeal is acknowledged this 13th day of February, 1915, as of legal time. Alex. Simpson, Attorney for Plaintiff.

24 *Recognizance.*

(In Usual Form.)

Complaint.

(Filed June 9, 1914.)

Hudson County Circuit Court.

JAMES TONSELLITO, Plaintiff,
vs.
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant.

Action at Law.

The plaintiff, James Tonsellito, residing at No. 647 5th Street, New Durham, Hudson County, New Jersey, says that:—

1. He is the father of a minor son named Michael Tonsellito, of the age of 17 years on the 23rd day of June, 1912, and said Michael Tonsellito is referred to in paragraph 3 of this complaint.

2. The defendant above named was in June 23, 1912, a foreign corporation, and was a common carrier by railroad engaged in interstate commerce between the State of New York, and the State of New Jersey, at Weehawken, in the County of Hudson, in the State of New Jersey, propelling cars, and carrying goods and passengers from one state to the other.

25 3. The plaintiff's said minor son, on the 23d of June, 1912, was an employe of the defendant company, and was working on an engine, firing the engine, raising steam, and preparing the said engine to be taken out of said State of New Jersey, in interstate commerce on that day, to the State of New York, to pull a passenger train containing passengers to be carried by said defendant on said day from said State of New Jersey to said State of New York, and also engaged in getting a barrel of oil to put on the said engine to be taken on the said engine, by the said defendant, on the said day from the State of New Jersey to the State of New York.

4. The plaintiff's said son, Michael Tonsellito, on the 23d day of June, 1912, while in the service of the said defendant as a common carrier by railroad (both plaintiff's said son and the said defendant being so engaged in interstate commerce) was injured, while doing the things mentioned in paragraph 3 as done by him at Weehawken in the County of Hudson aforesaid, by reason of the negligence of the defendant, resulting in whole or in part from the negligence of its officers, agents and employes, and by reason of defect and insufficiency, due to the negligence of the defendant in a certain locomotive, track and roadbed then and there used by the said defendant in interstate commerce as aforesaid.

5. The negligence of the defendant aforesaid consisted in this:—That it did not use reasonable care to have its roadbed in a safe

condition, but, on the contrary, the roadbed at the place where
26 the plaintiff's son was injured was so unskillfully and improperly made and graded that the said roadbed, and the ground adjacent thereto, were not level at a certain place, below the ties of the railway track, and on the track at said place there was a certain locomotive upon which the plaintiff's son was engaged, and the plaintiff's son, who was a minor of the age of 17 years, had not been properly warned and instructed by the defendant of certain hidden dangers connected with the said track and roadbed, produced by said unlevel condition of said roadbed and ground, which were not obvious to him by reason of his youth and inexperience, which produced a condition which was difficult and dangerous (although not obvious to a person of the inexperience and youth of the plaintiff's son) to persons mounting upon locomotives at said place, and the plaintiff's son, while so engaged in the service of the defendant, necessarily attempted to mount the said locomotive, and by reason of the negligence of the defendant as aforesaid, and by reason of the further negligence of the person in charge of the said locomotive, who did not give the plaintiff's son a reasonable opportunity to board the same, but started the said locomotive in motion, the plaintiff's son fell from and under the said locomotive, and by reason thereof his right foot was cut and mashed so that he lost the same.

6. The plaintiff's son by reason of the said accident lost his foot.

7. The plaintiff thereby was forced to lay out and expend money in medical expenses, to wit, the sum of $300.

8. The plaintiff thereby lost the services of his said son
27 from the day of said accident until the date of the within action, and will be deprived of the services of his said son during the minority of his said son.

The plaintiff demands $10,000.00.

ALEX. SIMPSON,
Attorney of Plaintiff.

28 *Answer.*

(Filed June 26, 1914.)

Hudson County Circuit Court.

JAMES TONSELLITO, Plaintiff,
vs.
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant.

Action at Law.

Defendant, a corporation organized and existing under and by virtue of the laws of the State of New York, says that—

1. It neither admits nor denies paragraph one of the complaint, not having sufficient knowledge of the matters set forth therein to form a belief, and therefore leaves plaintiff to his proof thereof.

2. It admits paragraph two of the complaint.

3. It denies paragraph three of the complaint.
4. It denies paragraph four of the complaint.
5. It denies paragraph five of the complaint.
6. It denies paragraph six of the complaint.
7. It neither admits nor denies paragraph seven of the complaint, not having sufficient knowledge of the matters set forth therein to form a belief, therefore leaves plaintiff to his proof thereof.
29 8. It denies paragraph eight of the complaint.

Second Defense.

Said Michael Tonsellito was contributorially negligent in that he attempted to board a moving engine at the time he received the injury complained of, by reason of which said injury resulted.

Third Defense.

The risk attendant upon the boarding of said engine by said Michael Tonsellito, in the manner and under the circumstances as alleged in the complaint was obvious to said Michael Tonsellito, and was therefore assumed by him.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

30 *Reply.*

(Filed July 16, 1914.)

The plaintiff for a reply denies all the matters set up by the defendant's answer under title second defence.

ALEX. SIMPSON,
Attorney for Plaintiff.

Judgment.

(Entered November 4, 1914.)

This action was tried before Luther A. Campbell with a jury at the Hudson Circuit on November 4th, 1914.

The cause having been heard and submitted to the jury, they returned their verdict as follows: They say that they find for the plaintiff and against the defendant and they assess the damages of the plaintiff on occasion of the premises at the sum of one thousand dollars ($1,000.).

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of one thousand dollars ($1,000.) and his costs which are taxed at the sum of fifty dollars and twelve cents ($50.12) making in the whole the sum of one thousand and fifty dollars and twelve cents ($1,050.12).

Judgment entered this November 4th, 1914.

LUTHER A. CAMPBELL, *Judge.*

Attest:
JOHN F. CROSBY, *Clerk.*

31 *Certificate.*

The answer of Luther A. Campbell, Esquire, Judge of the Circuit Court, holden in and for the County of Hudson, and within named, the record and proceedings of the plaint whereof mention is within made with all things touching the same, I send to the Judges of our Court of Errors and appeals of the last resort of all causes, at Trenton, N. J., at the day and year within contained, in a certain appeal to this writ annexed as within I am commanded.

LUTHER A. CAMPBELL, *Judge.*

32 *Stipulation.*

Mr. Simpson: When this case was put off there were certain stipulations made, last time, that you got. I have to get those stipulations that Mr. Hartpence made, because I have not got the engineer and he stipulated that I might read the testimony of the engineer, and also of the superintendent, to show what locomotive number this one was going out immediately after the accident.

Mr. Hartpence: Perhaps we can stipulate the fact without reading it.

Mr. Simpson: I stated what I thought I wanted to stipulate, and I will see if you will stipulate it or not.

Mr. Hartpence: Is it understood upon the record that the two cases are being tried together and that the testimony governs both? I do not think that has been formally placed upon the record.

The Court: With the assent of counsel it may be entered upon the record that the two cases, one of Michael Tonsellito against the New York Central & Hudson River Railroad, and the other of James Tonsellito against the same defendant, will be tried together, and that the testimony taken will apply to both actions. Is that consented to, gentlemen?

Mr. Simpson: That is consented to on my part, yes.

Mr. Hartpence: Yes.

Mr. Simpson: That is the stipulation I want to have made, whether Mr. Hartpence will consent to it or not, that locomotive number 3791, which is the locomotive which plaintiff was on, immediately before the time he was injured, and which one he was attempting to board at the time he was injured, was the locomotive of the Continental Limited, which left Weehawken at 2.25 in the afternoon of the day upon which the plaintiff was injured, taking a train from Weehawken, which train was taken by that

33 locomotive on that trip out of the State of New Jersey into the State of New York; that it left the Granton roundhouse at about 1:45 in the afternoon, to be attached to the train leaving Weehawken at 2.35 in the afternoon, and that at the time it left the roundhouse it had steamed up and was fired; that Albert W. Gayman, the engineer of the Continental Limited, took that locomotive from the Granton roundhouse to Weehawken, and subse-

quently that it took a train out of the State of New Jersey, leaving Weehawken at 2.35. That is the stipulation I want to make.

Mr. Hartpence: I have no objection to that, if the court please, unless it be to the one statement that at the time it left the roundhouse it had steam up and was fired. I do not want that to go to the extent of meaning that it had steam up and was fired at this trip that is referred to in the rest of the stipulation. I do not think that it was.

Mr. Simpson: Well, it was stipulated, the last time when this case was put off, that Gayman, being a difficult witness to reach, I could read his testimony. If that stipulation is not satisfactory, because it is important to me and I think that his testimony shows that to be the fact, I would like to read his testimony, as Mr. Hartpence stipulated here in open court when the case was adjourned last time, and I can do that later on by referring to the stipulation which Mr. Kelley has taken down in shorthand.

The Court: We will see.

Mr. Hartpence: I have no objection.

The Court: The idea is, all of the statement of Mr. Simpson is agreed to as a stipulation, except that portion which related to this point, that is, that the locomotive in question had steam up and was fired at the time it left the roundhouse.

34 Mr. Hartpence: No, if you put it that way I have no objection.

Mr. Simpson: At the time Gayman took it, it had steam up and was fired.

The Court: Then suppose you make that correction in the suggestion made by Mr. Simpson, and with that correction the stipulation is then agreed to by counsel for the defendant, and that obviates and makes unnecessary the reading of the testimony?

Mr. Hartpence: Yes.

Mr. Simpson: I do not think it makes it unnecessary. Of course, there may be some little thing that I have slipped up on, that I will have to look up. I do not waive whatever rights I had under the stipulation.

MICHAEL TONSELLITO, sworn.

Direct examination by Mr. Simpson:

Q. How old are you, Mike?
A. Nineteen.
Q. Where do you live?
A. 647 Bridge Street, New Durham.
Q. Did you ever work for the New York Central and Hudson River Railroad Company?
A. Yes.
Q. When?
A. On June 23, 1912.
Q. June when?
A. June 23rd, 1912.

Q. How long had you been working for them on June 23, 1912?
A. A year and a half.
Q. On June 23, 1912, were you in the Granton yard?
A. Yes.
Q. Were you hurt there?
A. Yes, sir.
Q. Near what switch were you hurt?
A. Nearer to the storehouse.
Q. What do you call the switch?
A. Third switch.

35 Q. Now I show you a picture. You saw the Granton yard and the switch and the track on the day that you were hurt, didn't you?
A. Yes.
Q. Is that a true picture of the condition of that track and yard at the time that you were hurt?
A. Yes, sir.
Q. I show you another picture. Look at that one. Is that also a true picture or a correct picture of the yard and track and the place that you were hurt on the day that you were hurt?
A. Yes, sir.

Mr. Simpson: I offer those two pictures in evidence.
Mr. Hartpence: Can you add any statement as to when the pictures were actually taken? Then I would have no particular objection.
Mr. Simpson: They were taken the day they were taken.
Mr. Hartpence: I understand that, but I want to know if you could state what particular time.
Mr. Simpson: I could, but I do not think it is essential.
Mr. Hartpence: I will object and ask for more formal or extended proof.
Mr. Simpson: Under the case of Temple vs. Clifford, it is simply necessary to prove that it is a true picture of the facts, that is all.
The Court: Let me see the case. It struck me that that is so.
Mr. Hartpence: I have no objection to the photographs going in if I can know when they were actually taken, so we might use them as an actual guide of the actual conditions. It is already in evidence that the conditions had practically not changed at that time, but I thought perhaps——
Mr. Simpson: I have no objection to putting it in.

36 Q. When were those pictures taken? Do you remember? You were down when they were taken with the photographer?
A. About two weeks ago, I think.

Mr. Hartpence: I have no objection to their being admitted.
(Photographs marked Exhibits P-1 and P-2.)

Q. With reference to these pictures, pointing out these pictures, will you show the place where you were at the time you were hurt?
A. I was—(indicating).
Q. Between ties 1 and 2?

A. Yes. Let me have your pencil. Right there, you say?
A. Yes.
Q. Mark that X. You mean those ties or between these ties?
A. Right between these ties.
The Court: Keep your finger where it was.
Q. One, two, three, where was it?
A. Right around the three, somewhere.
Q. You can't tell anything more definite than that?
A. No.
Q. Is that about the place?

Mr. Simpson: I will mark it. That is marked Exhibit P-2 K.
Mr. Hartpence: That was the first one.

Q. Is that the same?

Mr. Hartpence: I object to it as leading.

Q. Show me here about where you say with reference to this water pipe?
A. There (indicating).
Q. Put your finger there. It won't bite you.
A. Right there (indicating).
Q. Is that the place?

Mr. Hartpence: I object. It is not the place.

37 Q. Put a pencil on where you say.

The Court: Suppose you rub the other one off.

(Mr. Simpson complies.)
(Witness indicates with pencil.)

Q. About there? All right.

The Court: That is also marked by an X on Exhibit P-1.

(Photograph shown to jury.)

Q. When did you go to work, Michael, for the New York Central & Hudson River Railroad, first; how long before you were hurt did you go to work for them?
A. Oh, about a year and a half.
Q. Who was the man employed you? Who was the man that employed you?
A. Charlie Hassen.
Q. Charlie who?
A. Hassen.
Q. How much were you paid?
A. Sixteen cents an hour.
Q. What were you hired to do?
A. When I went to work it was a wiper.
Q. Wiping?
A. Yes.
Q. What did you wipe?
A. Wiping engines.

Q. What part of the engine did you wipe?
A. Wells, and everything.
Q. Wells, and everything?
A. Tanks and——
Q. During the first month did you do anything else besides wiping?
A. Why, I used to be sent down to the machine shop.
Q. Eh?
A. Sent down to the machine shop.
Q. What did you do in the machine shop?
A. Go and get material for the machines that was broken—fixed.
Q. What else did you do?
A. Why, I used to work around the roundhouse, clean up.
Q. What work did you do around the roundhouse?
A. Pumping engines.
38 Q. What do you mean by pumping? What was that pumping?
A. Why, the fire in the engine, and keeping water in the boiler.
Q. Where was the pump?
A. The pump was on the side of the boiler.
Q. What did the pump do when you worked in?
A. Put water in the boiler.
Q. When you say pumping engines do you mean that you pumped this water into the boilers?
A. Yes, sir.
Q. And that would keep the steam going, would it?
A. Well, the fire would keep the steam going.
Q. If you don't have any water you don't have any steam, would you?
A. No, wouldn't have any steam.
Q. How long had you been pumping before this day in June?
A. Oh, about a year.
Q. Had you ever fired engines?

Mr. Hartpence: I object to it on the ground it is leading.
The Court: It is leading, I suppose.

Q. What else have you done besides pumping and wiping engines and wiping headlights? What else had you done with respect to engines before the day you were hurt?

Mr. Hartpence: I object on the ground that it is immaterial as to what he did before he was hurt. I think this issue can be narrowed down to what he was doing at the time he was injured.

Mr. Simpson: Can't narrow the issues down any. Mr. Hartpence says he was a volunteer. He says he was a volunteer and he had no business to fire, and therefore it becomes essential to me to prove that he fired many times before this day, and had been seen firing many times before this day by his boss, to show he was not a volunteer.

39 The Court: I so understood.
Mr. Hartpence: I withdraw my objection.

Q. Go on and tell us, what had you done besides pumping and wiping, and the other things?
A. Firing engines, too.
Q. How often had you fired before the day that you were hurt?
A. Oh, I don't know, about fifty times.
Q. How many?
A. I don't know, about fifty or a hundred.

The Court: I don't understand.

Q. Fifty times, you say?
A. About fifty or a hundred.

The Court: Michael, try and talk as slowly and distinctly as you can, because otherwise what you say will be of no value to the jury, because it will be unable to understand it and hear you. Try and keep that in mind.

Q. Now on the day that you were hurt what were you doing in the morning?
A. Well, in the morning I went to work at half past four and we started in to clean up the office and after that, why, I went on the headlight job.
Q. On the headlight job? Was a man named Ohr around there in the morning?
A. Yes.
Q. About noon time or twelve o'clock?
A. Yes.
Q. What was Ohr?
A. Hostler.
Q. What did Ohr do with reference to you, if anything, about twelve o'clock?
A. Well, I was supposed to do whatever he told me unless I was on the extra——

Mr. Hartpence: I object.

The Court: That may be stricken out. You were asked another question.

Question repeated.

40 A. Fire an engine.
Q. Ohr fired it or what?
A. I fired engine.
Q. What happened before you fired the engine? What was said to you by Ohr, or what happened?
A. He says, "Come up and be my fireman; I got to get some steam up for me."
Q. Did he say anything else to you or anything besides, "Come up and be his fireman?"
A. Yes, told me to get a hook and shovel.
Q. What was the hook?
A. Hook up the fire.
Q. Did you get a hook?
A. Yes, sir.

Q. What did you do with it?
A. I put it on the engine.
Q. Did you get a shovel?
A. Yes.
Q. What did you do with that?
A. I put it on the engine.
Q. What did you do?
A. Then I got up and fired the engine.
Q. Did you get on the engine?
A. Yes.
Q. How did you get on the engine?
A. I went up the steps and got in the cab.
Q. Where was the engine when you got up on it?
A. Oh, right at the tool shed.
Q. Was Ohr on the engine or did he get on after you?
A. He was on the engine.
Q. Then as soon as you got on the engine you say you put a hook and shovel on, what did you do?
A. I started to get some steam up.
Q. How did you start?
A. Put some coal on, and then I hooked her up and put some water in the——
Q. In the boiler?
A. In the boiler.
Q. Then what was the effect of that, when you put some coal on and hooked it up and put some water in the boiler, what did that do to the engine?
A. That gave it more steam.
Q. Then what did Ohr do?
A. He started in to drive down to the first switch.
41 Q. Into the first switch?
A. Yes.
Q. What side of the cab were you on when he started to drive up into the first switch?
A. Well, I was down firing the engine in the middle of it.
Q. In the middle of the engine?
A. Yes.
Q. What happened then when he got to the first switch?
A. Then I got out and threw it; we went down to the second switch.
Q. What was the switch that you threw, the first switch?
A. That was number one switch.
Q. Number one. Then what did you do after you threw number one switch? Did you go back?
A. Then he kept right down to the machine shop.
Q. Well, did you come to another switch?
A. Yes.
Q. What did you do when you got to the other switch?
A. Threw that switch.
Q. Did you get back on the engine?
A. Yes.

Q. Was the engine moving when you got back on it the second time?
A. No, sir.
Q. He stopped it, did he?
A. Yes.
Q. And it stopped until you got on?
A. Yes.
Q. Now then when you got to the third switch, what did you do?
A. I got off and threw that switch.
Q. Then what did you do?
A. When I was coming back I was going to get on the engine——
Q. Wait a minute. How far back of the third switch were you going to get on the engine? How far back did you have to go to get on the engine.

Mr. Hartpence: I object.

Q. How far did you go? About how far back of the third switch did you go?
A. Back near to that pipe there.
Q. Between the pipe and the switch?
A. Between the pipe and the switch.
Q. At the point where you marked on the picture?
A. Yes.
42 Q. Why did you go back that far to get on? Where was the cab?
A. That was the cab.
Q. Where the cab was. How was the ground at this water pipe and at the point where you tried to get on the engine; was the ground level with the ties, or was it down lower here?

Mr. Hartpence: I object to it as leading.

A. Down lower.

Mr. Simpson: I asked him whether it was level or whether it was lower. That certainly is not leading.
Mr. Hartpence: The first part of the question, the condition of the ground, and then was it level or lower.
The Court: It is really directing the attention of the witness to the testimony, that is all.

Q. What was the condition of the ground at this point where you have marked, with reference to height? What was it?
A. Well, it was kind of low.
Q. Do you know how much lower it was than the ties; a foot or two feet?
A. About two feet.
The Court: The top of the ties?
Q. That is from the top of the ties?
A. About two feet.
Q. When you say two feet do you mean two feet down to the solid ground?
A. Yes.

Q. Where did you step from to get on the engine? Was it this point that you have described as two feet down from the ties or was it some other point?

A. It was there where I marked it there.

Q. Was it beyond—was it down here at the ground or up on the ties?

A. Well, I was about in the middle there.

43 Q. In the middle here; you mean of the ties?

A. Yes, where I marked.

Q. I know you are in the middle where you marked, but I want to know where you were, actually on the ground here, or were you up on the ties? Were you down all the two feet?

A. I was there.

Q. Where the two feet is?

A. Yes.

Q. When you tried to get on the locomotive from the point you were in what happened?

A. Just as I was going to get on he starts off and he throws me.

Q. Where did you go?

A. My foot got run over.

Q. Where did your foot go, under the wheels?

A. Under the wheels.

Q. How did you start to get on from this place; did you lift your foot up to get on?

A. Yes.

Q. How was it, hard or easy? How was it to reach the step?

A. It was hard.

Q. Why was it hard?

A. Because it was too high.

Q. The step was too high?

A. Yes.

Q. From where you stood?

A. Yes.

Q. Were you able to reach it or were you able to get your foot on the step?

A. No.

Q. Eh?

Mr. Simpson: Your honor, these men are grinning and laughing at the witness and distracting the attention of the jury from the examination. Whether they are trying to make fun of the testimony I don't know, but I cannot certainly——

The Court: I did not notice it, Mr. Simpson, but this will apply to all persons in the court room, whether interested in this case or not, that no demonstration of any character is to be made. If it continues, I, of course, will have to take such steps as are necessary to stop it.

44 Q. Well, Michael, after this that you have described, what happened to you? Were you taken away or what?

A. Yes, a couple of men picked me up and brought me to the machine shop, up near the storehouse.

Q. What was the condition of your foot?

A. It was crushed.
Q. Where were you taken from there?
A. To the North Hudson Hospital.
Q. How long were you in the North Hudson Hospital?
A. About ten weeks, I guess, nine or ten weeks.
Q. When you came out of the North Hudson Hospital, where were you taken?
A. At home.
Q. How long were you at home? If you don't know, say you don't know.
A. I don't know.
Q. When they got through with you at the Hospital did you have any foot?
A. No, sir.
Q. How high up had they taken off your foot?
A. At the ankle.
Q. You have been examined by Dr. Arlitz since that time?
A. Yes, sir.
Q. Going back to the time when you went to work, who was the man that you say you saw when you first went to work?
A. I saw Mr. Howard.
Q. Hansen, was it?
A. No; Hansen was the foreman.
Q. Who was the man that you saw when you got your employment?
A. Saw Mr. Hassen.
Q. Mr. Hasser?
A. Yes.
Q. Who was the man immediately above you? Who was your boss?
A. Mr. Hassen.
Q. Hassen? Was Hassen working there at the time you were hurt?
A. No, sir.
Q. Who was your boss at the time you were hurt?
A. Mr. O'Connor.
Q. Well now, what was O'Connor? What was his position there?
A. General foreman.
Q. What did he tell you when he came there that you were to do?
A. Extra man.
Q. Did he tell you what you were to do with reference to other people around the shop?
A. Yes; do anything they told me.
Q. Do anything that they told you?
A. Yes.
Q. So, for a period of about—when did Mr. O'Connor come there? How long before you were hurt?
A. I think about a year.
Q. Well, for a period of a year before you were hurt, what did you do with reference to what other people told you?

Mr. Hartpence: I object, on the ground as to what he did with respect to other people, unless those other people are designated in some way as being people who could bind this defendant——

Mr. Simpson: The instructions of the defendant were to do what other people told him in the shop. I may not be able to name what other people, but if the immediate superior tells me, it seems to me it is relevant what he said.

The Court: Of course the answer to that previous question was a very general one, and I do not imagine for a moment that you are directing your question to that point, nor does he intend to indicate some person who was of a lesser position than he. Undoubtedly you did not intend that. I think he is entitled to know a little more specifically at least who the persons were about the shop whose orders he was to take or was directed to take.

46 Q. Who did Mr. O'Connor tell you to obey? You say he told you to do what other people told you. Who did he name when he told you to do what other people told you?

A. Machinists.

Q. And who else?

A. Boiler makers and all them things.

Q. Who were the hostlers there?

A. Fred Ohr.

Q. Is he the only hostler?

A. Yes.

Q. Did Mr. O'Connor tell you anything about Freddie Ohr, about doing what Freddie Ohr told you to do?

A. Yes.

Q. What did he tell you? What did Mr. O'Connor tell you about Freddie Ohr.

A. He says, If he needs any help, why, I should go with him.

Q. Needs any help, go with him?

A. Yes.

Q. Before the day that you were hurt had Freddie Ohr ever called you before?

A. Yes, sir.

Q. How many times?

A. Oh, about a hundred times.

Q. A hundred times? *A.* What had he told you to do during those times?

A. Well, fire the engine, get some steam up.

Q. Fire the engine and get steam up? What did Freddie Ohr do with these engines? Where did he take them?

A. Sometimes we used to go down for coal and water, and he used to take them in and out of the house.

Q. Take them out of the house; is that the place where they waited for the engineer, where they took them?

A. Yes.

Q. Where were you going with this engine where you were on with Ohr? Where was the engine going that you were pumping up the fire and putting steam on?

A. We were going for a barrel of oil.

Q. Where were you going?
A. Storehouse.
Q. Where was the storehouse with reference to this third switch? Was it on this track?
A. Yes, sir.
Q. Was this the storehouse track?
A. Yes, sir.
47 Q. You did not actually get up to the storehouse before you were hurt, did you?
A. No, sir.
Q. Now when you got on this engine before you fired it up what was the condition of it as to steam; was the steam low or was the steam high?
A. It was high.
Q. What did you do with it, what did you do to keep it high? Put coal on?
A. Put coal and water.
Q. And pump water to keep the steam up?
A. Yes, sir.
Q. Had you ever done that before?
A. Yes.
Q. Now when you came back from the third switch did you do anything with your hands at all?
A. Yes, sir.
Q. What did you do?
A. Grabbed hold of the railing.
Q. Which railing
A. Oh, on the tank.
Q. The locomotive?
A. On the tank, yes.
Q. On the tank?
A. Yes.
Q. What was that, a rod?
A. Yes.
Q. Was it near the step?
A. That was above the step.
Q. Above the step; you reached that with your hand?
A. Yes.
Q. Which hand?
A. With the——

The Court: He don't answer the question.

A. On the left hand.
Q. The left hand grabbed it? Now you say that Mr. Ohr started the engine the time it went over your foot. Was it going fast or slow?
A. Well, it was going about four miles or five miles an hour.
Q. Four? It wasn't going any faster than a man could walk?
A. No.
Q. It was going very slowly?
A. Yes.

48 By the Court:

Q. Which side of the locomotive were you getting on, Mr. Michael?
A. On the engineer's side.
Q. On the engineer's side?
A. Yes.

By Mr. Simpson:

Q. Why did you choose the engineer's side to get on?

Mr. Hartpence: I object, on the ground that why he chose that is not material.

The Court: I do not think it is.

Q. Was the engineer's side the same side as the switch?
A. Yes, sir.

Cross-examination by Mr. Hartpense:

Q. Michael, had you ever gotten on and off an engine of that same kind as 3791 before that day?
A. Yes, sir.
Q. Where?
A. In the roundhouse.
Q. In the roundhouse?
A. And outside the roundhouse.
Q. Whereabouts outside the roundhouse?
A. By the tool shop.
Q. How near is the tool shop to the roundhouse?
A. About two hundred feet or three hundred feet.
Q. How far?
A. About three hundred feet.
Q. I can't hear you?
A. About three hundred feet.
Q. Well, did you ever get on or off such an engine when it was moving?
A. Did I ever got off?

The Court: On or off such an engine when it was moving.

A. No, sir.
Q. You never did?
A. No, sir.
Q. Always got on or off when it was standing still; is that right?
A. Yes, sir.

49 Q. Did you ever get on or off such an engine anywhere except in the roundhouse and by the tool shop before this occurrence?
A. We used to get a ride home at night down to the coal pocket; got off down there.
Q. How far is that from the roundhouse?
A. About a mile.
Q. You could jump off then, couldn't you, while the engine was moving?
A. No, sir, it stops at the coal pocket.

Q. You got off then?
A. Yes, sir.
Q. Was the tool house anywhere near the place where you were hurt?
A. No, sir.
Q. Was the machine shop anywhere near where you were hurt?
A. Which machine shop?
Q. The one that you referred to when you said you sometimes went to the machine shop from the roundhouse?
A. Well, that is about a half a mile.
Q. Which way, south or north?
A. South.
Q. When you would go down to the machine shop would you ride on an engine or would you walk?
A. Well, we used to have a hand car and have to push it down.
Q. Oh, you would go down on the handcar?
A. Yes.
Q. You sometimes walked, didn't you?
A. Yes, sometimes we walked.
Q. Sometimes rode on the hand car?
A. We walked or pushed it down.
Q. What say?
A. We pushed it down.
Q. Pushed the car?
A. Yes.
Q. What tracks would you take to go down to the machine shop when you would go?
A. It was a track that leads from the storehouse down to the machine shop.
Q. This same track on which the engine was standing, or on which the engine was when you were hurt; is that right?
A. Yes, sir.
50 Q. So you have been up and down that track before, hadn't you, the day you were hurt?
A. Yes, sir.
Q. You had worked there, you say, about a year and a half——
A. Yes.
Q. —before you were hurt. Had you ever ridden on an engine around on that storehouse track before the day you were hurt?
A. Not on that track.
Q. Not on that track?
A. Not on that track.
Q. Where was Ohr, the engine man, when you got off the engine there at the switch at which you were hurt?
A. He was up in the cab.
Q. Well, did you have to pass him in order to get off the engine?
A. He was sitting up on the side of the cab and I go down the steps.
Q. Where had you been sitting?
A. Well, I was on the fireman's side.
Q. On the left hand side?

A. Yes, sir.
Q. Well, he didn't tell you to get off and throw that switch, did he?
A. Well, I knew it had to be thrown.

The Court: No; you are not asked that. Listen to the question.

(Question repeated.)

A. No.
Q. Was the engine standing still or moving when you got off?
A. Standing still.
Q. It had stopped, had it?
A. Yes, sir.
Q. Was the engine anything like the engine which is shown in this Exhibit P-1?
A. The tanks are different on it, that is all.
Q. How about the engine part, was that about the same?
A. Yes.
Q. But the tank is a little different?
A. Yes.
Q. In what way was it different?
A. Well, longer and different.
51 Q. In the back part of the tank it is not square; was it like this one?
A. Was square like this one.
Q. Cut off; is that about right?
A. Yes, sir.
Q. What is this place over here, Michael, where this engine is standing?
A. That is the ashpit.
Q. That is the ashpit?
A. Yes.
Q. Are there tracks running along there?
A. Yes.
Q. Well, right beneath the engine here, what is that sort of a bank there?
A. Big bank.
Q. It is a fill—filled off with cinders?
A. Yes, that was filling it up. Th-s is all coal (indicating).
Q. Over here at the point where you say you were at the time you were hurt, which you have marked X, there were cinders along there too, weren't there?
A. Along here, there wasn't nothing there.
Q. When you say that the ground was two feet or about two feet below the top of the ties at that point where you were hurt, you mean that it was filled in with cinders for about two feet? That is what made the ties higher than the ground?
A. Yes.
Q. The ties rested on cinders?
A. Yes.

Q. And there was a fill there, wasn't there, in order to get up the hill going to the storehouse track?
A. Yes.

Mr. Simpson: I object. He cannot tell what the purpose of the fill was. That is not proper cross-examination. He has not said anything on direct as to what the purpose of the making of the track is. He cannot be asked what the purpose was on cross examination, and he has not been qualified on direct examination.

The Court: Well, that may be so, Mr. Hartpence.

52 Mr. Hartpence: Well, it simply calls, it seems to me, for a statement by this witness of what he could see with his own eyes, that the fill was there, built up—I did not mean to put it in the shape to call for an expert opinion. It seems to me it is perfectly competent to show by this witness that he understood and knew that it was a fill and what its purpose was and what it was there for. He testified he went up and down there to the machine shop.

The Court: Well, I will leave it stand, whatever there is in now. I will leave it stand.

Mr. Hartpence: Yes.

Q. Now will you show, Michael, the point where you turned this last switch when you were hurt?
A. Right here (indicating).
Q. Now you mark it with two XX's, if you will. Mark it heavy right where the switch is also. Now put another X alongside of it. (Marks two XX's.)
A. Yes, sir.
Q. That is the switch that you turned?
A. Yes.
Q. After you turned the switch what did you do?
A. I walked back and I was going to get on the engine.
Q. Do you remember which way the track ran after you turned the switch—which way the engine would have gone?
A. Why, it came over this way.
Q. Over to the left?
A. Yes.
Q. You would have taken the track to the left?
A. Yes.
Q. And would have gone where?
A. To the storehouse.
Q. Where did the right hand track go?
A. Up to the power house.

53 Q. How near to the storehouse was the power house?
A. About a hundred feet.

Q. Well, right here at this switch, that is, to the right of it, the cinders are filled in level there with the ties, aren't they?
A. Yes, a little bit.

Mr. Simpson: Talk up, nobody can hear you.

Q. And the descent down to the low ground was not quite so steep there as it was down here?

A. No, sir.

Q. And there were two large planks right there at the switch on those, weren't there?

A. Yes, sir.

Q. That were perfectly level?

A. Yes, sir.

Q. If you, after you had turned the switch, had stood right there at the switch or a little bit to the right of it, and had waited until the engine passed over to that point, you could have stepped on the engine then without any trouble or difficulty, couldn't you?

(Objected to as calling for the conclusion of the witness. Objection overruled.)

Q. Well, if the engine was stopped I could.

Q. Now, Michael, when you went down to this po-nt which you have marked X, and where you say you stood as you attempted to get on the engine, you were right down in a hole there, weren't you?

A. Yes.

Q. Two feet below the top of the ties?

A. Yes, sir.

Q. And from that point you reached up and took hold of the grab iron on the tank with your left hand; is that right?

A. Yes.

Q. Did you reach the grab iron on the other—on the rear of the cab—with your right hand or didn't you?

A. Well, I was just going to get hold of it when he slapped me over.

54 Q. Yes. Did you have either foot up on the step of the tank or the engine?

A. Well, my left foot was pretty near all the way up, and it threw me.

Q. Well, had your left foot actually reached the step before you were thrown? Did you have your left foot actually on the step of the engine or the tank belonging to the engine?

A. Yes; it was right on when they threw me.

Q. It was the moving of the engine that threw you?

A. Threw me.

Q. Do you remember how high up you had to reach in order to take hold of that iron?

A. About four feet.

Q. Well, do you remember whether you had to put your arms up this way in order to do it, or whether you just reached out straight to do it?

A. No.

Q. Had to put your arms up that way to reach it?

A. Yes.

Q. Well, the engine was actually moving, wasn't it, at the time you did that?

A. No; when I was getting on the engine started off just as I had my foot up, he starts right off.

Q. When you threw the switch how did you get back to this point where you stood?
A. I walked back.
Q. Where did you walk?
A. Right along here.
Q. Make a straight line with the pencil right where you walked.
(Witness complies.)
Q. Well, did the engine start after you threw the switch?
A. No, it was standing there until I got back there.
Q. What is this little upright piece there, right there at the switch?
A. This?
Q. Yes?
A. This here? I don't know. These are signal colors or something.
Q. Signal colors?
A. Yes.
55 Q. There is a lamp in there which is lighted at night?
A. Yes, sir.
Q. How far back of that signal lamp was the pilot of the engine when you turned the twitch?
A. Right there (indicating).
Q. How many feet back?
A. About a foot.
Q. About a foot back from the signal lamp itself?
A. Yes.
Q. What is this pipe, Michael, that goes along here and then curves out around at the point where you stood?
A. Compressed air pipe.
Q. That runs all along the tracks down there?
A. Yes, sir.
Q. I see here where this bulge comes it is supported by a plank which is buried in the ground there, isn't it?
A. Yes.
Q. And then it is all dug out around that pipe?
A. Yes, sir. I don't know if it was dug out.
Q. Well, there is a hole right there?
A. Yes—it is level down here though.
Q. This part down in here is the level ground?
A. Yes.
Q. Running all up this way?
A. Yes.
Q. Now I show you, Michael, Exhibit P-2, and ask you what this shed or house is over here on the center of the picture?
A. That is where the fire cleaners stayed.
Q. Where is the ashpit located on that picture?
A. Right over here (indicating).
Q. Off to the left of this house?
A. Yes, sir.
Q. Is this the same track running up along there that you have——

A. That runs to the store—or the roundhouse.
Q. That runs up to the roundhouse?
A. Yes, sir.
Q. When you left the roundhouse and went down to switches number one and number two, before you came up on the storehouse track, did you go down on that track?
A. Yes, sir.
56 Q. There by the ashpits?
A. Yes, sir.
Q. Went right over the ashpits?
A. Yes, sir.
Q. Then after you switched around further down you came back up in the same direction of the storehouse?
A. Then we came up.
Q. This point on Exhibit P-2, which you have marked with X is the place where you stood at the time you attempted to get on the engine; is that right?
A. Yes, sir.
Q. Will you show on this Exhibit P-2, the switch which you turned just before you were hurt?
A. This one.
Q. Mark that with two XX's.
A. (Witness complies, marking with XX.)
Q. About how far back of the signal lamp was the pilot—the front part of the pilot of the engine when you threw the switch?
A. About one foot here.
Q. Well, will you mark that with a round ring?
(Witness Complies).
Q. When you first went to work there at Granton Mr. O'Connor told you what to do, didn't he?
A. Mr. O'Connor, yes, sir.
Q. He was your boss, wasn't he?
A. Yes, sir, before Mr. Hasson.
Q. Well, what was Mr. Hasson; what did he have to do with you?
A. He was my foreman the year before Mr. O'Connor come.
Q. Well, Mr. O'Connor came there and took Mr. Hasson's place after you were there?
A. Yes, sir.
Q. And you wiped the engines in the roundhouse. didn't you?
A. Yes.
Q. When you first went there?
A. Yes.
Q. You were known as an engine wiper?
A. Yes.
Q. Whenever the engines came in the roundhouse you cleaned them up?
A. Yes, sir.
Q. Cleaned the headlights?
A. Yes, sir.

57 Q. The head parts of the engine?
A. Well, no—the headlight job is different; that is another man got that.
Q. You did that part of the time?
A. Oh, when I was on the extra work.
Q. When did you first go on this engine 3791 that day that you were hurt?
A. At the tool shed.
Q. That you say was about three hundred feet away from the roundhouse?
A. Yes, sir.
Q. When you got on you say the steam was up?
A. Did not have much steam.
Q. How much steam did they have?
A. About eighty pound.
Q. What time was that?
A. About half-past twelve.
Q. At noon—half past twelve, which is afternoon?
A. Well, it was twelve o'clock when I got on the engine.
Q. It was what?
A. Twelve o'clock.
Q. When? When you did what?
A. The day I got hurt it was twelve o'clock when I went with him.
Q. What did you do at twelve o'clock?
A. Well, I was going to go and get my card punched for the noon hour.
Q. For the noon hour?
A. Yes.
Q. Did you go home for your noon meal?
A. No, sir.
Q. Where did you eat that?
A. I was working at noon hour.
Q. I know, but where did you eat your noon lunch?
A. Didn't eat nothing at all.
Q. Where did you usually eat your noon lunch?
A. At the tool house.
Q. You took your lunch with you?
A. Yes, sir.
Q. Your usual noon hour was from twelve to one, wasn't it?
A. Yes.
58 Q. What time was it when you first got on the engine 3791 there at the tool house?
A. Twelve o'clock.
Q. What time was it about, if you can tell, when you were hurt?
A. About half-past.
Q. You say you had about eighty pounds of steam up when you got on?
A. It was eighty pounds of steam.
Q. Well, how long was it after you got on the engine before Ohr started the engine down the track?
A. About fifteen minutes.

Q. It stood there about fifteen minutes at the tool house before Ohr started?
A. Yes, sir.
Q. What did you do in that time?
A. I was getting some steam up.
Q. What did you do to get the steam up?
A. Put some coal, hooked up the fire and put some water in the boiler.
Q. Do you remember how much coal you put on?
A. I don't know.
Q. How many shovelfuls did you put on?
A. About thirty.
Q. About thirty, and you put those right on the fire, did you?
A. Yes.
Q. Then the fire came up?
A. Yes.
Q. As the fire came up the steam rose higher?
A. Kept going up.
Q. Do you remember how much steam was on when Ohr started down the track?
A. Oh, it was about ninety pounds or a hundred.
Q. How much did you have just before you got to the switch where you were hurt, Michael?
A. One hundred and eighty.
Q. One hundred and eighty. Was the engine moving when you got off at number one switch?
A. No, sir.
Q. Was it moving when you got on?
A. No, sir.
Q. Was it moving when you got off at No 2 switch?
A. No, sir.
59 Q. Was it moving when you got on?
A. No, sir.
Q. Was it moving when you got off at No. 2 switch?
A. No, sir.
Q. Well, it was moving when you got on No. 3 switch, wasn't it?
A. Sir?
Q. It was moving when you got on at No. 3 switch, wasn't it?
A. No, sir; when I got on, then she started off just as I was getting on.
Q. Just as you were getting on?
A. Yes, sir.
Q. And you say, Michael, that the track and the conditions there at the switch shown in these two photographs, Exhibits P-1 and P-2, are just the same as they were the day you were hurt?
A. Yes, sir.
Q. You were pretty familiar with the conditions there, weren't you?
A. Yes; went down there every day.
Q. Went down there every day?
A. Pretty near.

The Court: What was that answer?

Mr. Hartpence: He says yes, I was down there every day, pretty near.

Q. How old were you when you first started to work there at the roundhouse?

A. Fifteen, going on sixteen.

Q. Going on sixteen when you first started to work?

A. Yes, sir.

Q. How old are you now Michael?

A. Nineteen.

By the Court:

Q. When was your last birthday?

A. When was my last birthday?

Q. When were you nineteen?

A. Last November.

Q. Last November?

A. I will be twenty this——

60 Q. You will be twenty this coming November? What time in November, do you know?

A. The fifth.

Q. Then you were nineteen years old November 5 of 1913?

A. Yes.

Q. Is that correct?

A. Yes, sir.

By Mr. Hartpence:

Q. Have you done any work at all since you were hurt, Michael?

A. Not much; couldn't get no work.

Q. Well, what work have you tried to get?

A. Well, I was trying to get a chauffeur's job, and I couldn't get it.

Q. Have you tried to get any other kind of a job?

A. No, sir.

Q. Have you gone to school any since you were hurt?

A. No, sir.

Q. You went to school before you were hurt, didn't you, before you went to work there?

A. Before I went to work on the railroad?

Q. Yes?

A. Yes, sir.

Q. Do you remember what school you went to last?

A. Public School No. 3.

Q. In what grade were you when you left?

A. Fifth.

Q. How long was it after you were hurt before you were able to leave the hospital?

A. About nine or ten weeks.

Q. About nine or ten weeks? How long after that was it before you were able to walk around?

A. About a year.

Q. About a year?
A. About a year.
Q. During that year were you at home?
A. Yes, sir.
Q. In the house?
A. Yes, sir.
Q. All the time?
A. Yes, sir.
Q. Since then you have been walking around, haven't you?
A. Yes.
61 Q. You have been working since then over at the garage, haven't you, of your brother-in-law?
A. Wasn't working there.
Q. You have been over there haven't you?
A. Yes.
Q. Day after day?
A. Yes, sir.
Q. How far is that from your house, Michael?
A. About two blocks.
Q. You walked down there and back, didn't you?
A. Yes.
Q. Did you say yes or no?
A. Yes.
Q. And you have and you do operate an automobile, do you not, Michael?
A. Yes, sir.
Q. Yes, sir?
A. Yes, sir.
Q. You have a license, a chauffeur's license, haven't you, from the State of New Jersey, to do that?
A. Yes, sir.
Q. Got one in 1913, didn't you?
A. Yes, sir.
Q. And also one in 1914?
A. Yes, sir.
Q. Still have it, haven't you?
A. Yes, sir.
Q. Have you learned or tried to learn to do anything else besides running an automobile?
A. Before that I was learning telegraph.
Q. Learning to telegraph?
A. Yes.
Q. How long did you do that?
A. Well, about two months.
Q. Have you done any of that since?
A. No, sir.
Q. Did you learn?
A. No, sir.
Q. Where were you when you were learning to telegraph?
A. I was in West New York schools.
Q. Eh?
A. A school at West New York.

Q. That is where you were?
A. That is where the school was.
Q. How much money, Michael, did you make at the time you were hurt, Michael, a month? How much money were you making a month at the time you were hurt?
A. When I was hurt?
62 Q. Yes.
A. I didn't get no money from the company.
Q. Didn't you get money while you were working for the railroad company?
A. Yes.
Q. How much did you get?
A. Oh, about fifty dollars a month.
Q. Fifty dollars a month?
A. Yes.
Q. Who told you to go around on the engine the day you were hurt with Ohr?
A. Freddie Ohr told me.
Q. Anybody else?
A. No, sir.
Q. And you were on your way to the tool house to eat your dinner when he called you, weren't you?
A. I was going to get my card punched and then come back and eat.
Q. And then come back and eat?
A. Yes.
Q. Who punched your card?
A. Well, the clerk.
Q. At the tool house?
A. The storehouse.
Q. At the storehouse?
A. Or the office.
Q. At the office?
A. Yes.
Q. Where had you been working before that, that morning?
A. Up on the headlight job that day.
Q. What?
A. On the headlight job.
Q. In the roundhouse?
A. No, on the headlight job outside.
Q. Outside the roundhouse?
A. Yes.
Q. You mean you were cleaning the headlights?
A. Yes, and filling them up.
Q. So you got on the engine then and went on around the store house or towards the storehouse with Ohr; is that right, when he called you?
A. Oh, we go around. Yes, we went around there.
Q. And you put coal on the fire and pumped water into the boilers, is that right?
A. Yes, sir.
63 Q. And rode on around towards the storehouse?
A. Yes.

Q. That is when you were hurt?
A. Yes.
Q. You had not got to the storehouse yet, had you, when you were hurt?
A. No, sir, until they carried me.

Redirect examination by Mr. Simpson:

Q. What is this punching your card; what do you mean by that, you were going to get your card punched?
A. There is a clock they have got, they punch the time you go there.
Q. That is the time you stop work?
A. Yes.
Q. To eat your dinner?
A. Yes.
Q. Then you go back and punch it after you are through eating dinner?
A. Yes, sir.
Q. Did you go and get your card punched before you were hurt, or were you called on your way?
A. Just as I was going.
Q. You did not get it punched?
A. No.
Q. You got on the engine before it was punched?
A. Yes.
Q. You stated to Mr. Hartpence you put on coal and got up the steam, and you said to me something about hooking up; what did you mean by hooking up?
A. Hooking the fire.
Q. You put this iron hook in the fire and pull it around?
A. Yes.
Q. Is that after you put the coal on or before?
A. After you put the coal on.
Q. What does that do?
A. Makes it burn up.
Q. Is that what brings the steam up?
A. Yes, sir.
Q. You stated to Mr. Hartpence when you got off and threw number one switch and got on the engine was stopped. Did Ohr tell you to throw number one switch?
A. No, sir.
Q. Did not tell you to throw any, did he?
A. No, sir.
64 Q. But the engine stopped at one and you got on and it stopped at two and you got on?
A. Yes, sir.
Q. And did it stop at three when you got off?
A. Yes, sir.
Q. You say you have got a chauffeur's license; what do you mean by that? You mean a card that the secretary of our State gives?
A. Yes, sir.

Q. They did not examine you whether you had a wooden foot or not, did they, when they gave you a card?
A. No, sir.
Q. You simply signed an application blank, didn't you?
A. Yes, sir.
Q. And told about your age and all that?
A. Yes.
Q. They did not ask you whether you had a wooden foot or not?
A. No, sir.
Q. You did not tell them you had a wooden foot?
A. No, sir.
Q. Simply gave the card to run an automobile?
A. Yes, sir.
Q. And all they asked you to do before they gave you a card was to sign this application, wasn't it?
A. Yes, sir.
Q. Now at this switch Mr. Hartpence asked you something about a switch. Is that ground level at the switch or is it low at the switch.

Mr. Hartpence: I object to it as leading.

Q. What is the condition of the ground at the switch?

Mr. Hartpence: I object to it as not proper redirect examination.

A. It is low there.

Mr. Simpson: It is entirely within your Honor's discretion.
The Court: I do not recall any testimony on his direct examination as to the condition of the switch.
65 Mr. Simpson: No, I did not ask him.
The Court: I think it was all directed to the point where he was attempting to get on.

Q. At this switch was the ground—what was the condition of the ground here with reference to the switch?
A. Well, it was lower on one side.
Q. That is between the switch and the water pipe?
A. Yes, sir.
Q. Was it as low as the place where you fell, or not as low?
A. Not as low.
Q. What was the condition; how much higher was it at the switch than at the place where you fell?
A. About a foot.
Q. And it was a foot lower here and two feet lower there?
A. Yes, sir.
Q. When you walked back was the engine stationary?
A. Yes, sir.
Q. That is, if you had waited there—when you were there standing, and threw the switch, what part of the engine were you opposite? When you went up to the switch what part of the engine was opposite the switch when the engine was stationary?
A. Was that the right side?

Q. No. When you stood at the switch and threw the switch where was the headlight of the engine?

A. The head? North.

Q. North of the switch?

A. Yes.

Q. Then the front wheels were not over the switch, were they, when you threw it?

A. No, sir.

Q. Where was the cab with reference to the place you were hurt; where was the cab standing, in other words, when the engine was stationary?

A. There (indicating).

Q. At the water pipe?

A. At the air pipe.

Q. When you got back to the cab was the engine in motion or was it still standing?

A. Standing.

66 Q. Now had Ohr or anybody told you anything about the danger of attempting to get on an engine at this point where you tried to get on?

(Objected to. Question withdrawn.)

Q. Did Ohr instruct you in any particular as to what danger there was, if any from attempting to step on an engine from a point two feet below the ties?

A. No, sir.

(Objected to. Question withdrawn.)

Q. Did you receive any instructions about boarding the engines at a point where the roadbed was two feet below the ties?

A. No, sir.

Q. How much money did you say you have made since you were hurt?

A. About fifty dollars.

Q. Fifty dollars or fifteen dollars? There is the last man on that jury that is straining his ears to hear what you are saying. You might as well be in Weehawken if you don't. Your roar out in the hall and now you talk to yourself. How much money have you made?

A. About fifty dollars.

Mr. Hartpence: I object to it as immaterial, how much he has made.

Q. How much have you earned since you have been hurt?

Mr. Hartpence: I object to it. It seems to me as to how much he has produced to his father might be relevant—the father is suing—but as to how much——

Mr. Simpson: We have to do one thing at a time. I should think only his earnings would go to his father.

The Court: Is not that the presumption, that they do go to the father?

Mr. Hartpence: Yes.

67 The Court: So far the question may be framed, how much you have earned or how much you have turned over to your father. It would amount to the same thing so far in the case.

Mr. Hartpence: Yes.

The Court: I will allow that question.

Q. How much have you earned?
A. About fifty dollars.
Q. Fifty dollars or fifteen dollars?
A. Fifty.
Q. Have you attempted to get work? Have you tried to get work? Have you tried to get a job?
A. Yes, sir.
Q. As what?
A. Chauffeur.
Q. Have you succe-ded?
A. No, sir.
Q. Why not.
A. I don't know—because I got a wooden foot, I suppose.
Q. Not what you suppose, but what have the people told you when you tried to get a job?

Mr. Hartpence: I object, as I do not think that is competent evidence, what these people may have told him. They might have told him anything. How could that be brought in here as evidence.

Mr. Simpson: I will withdraw the question.

Q. Why were you not able to get a position as chauffeur?

(Objected to as calling for a conclusion, and that the name of some person to whom he applied would have to be specified. Objection sustained.)

Q. Where did you try to get a position?
A. I don't know; a whole lot of places.
Q. Trying to get a place as a chauffeur?
A. Yes, sir.

68 Q. This fifty dollars that you spoke of, have you earned that driving a machine, or how have you earned that?
A. Well, driving a machine.
Q. How much would you get when you worked?
A. Get about two dollars or three dollars a day.

Recross-examination by Mr. Hartpence:

Q. Who examined you, Michael, when you got your license from the State to drive a machine?
A. An inspector.
Q. Where?
A. Jersey City.
Q. What part of Jersey City?
A. Montgomery Street.
Q. No. 1, Montgomery?

A. No, sir; City Hall.
Q. The City Hall? Do you know his name?
A. No, sir.
Q. Well, he asked you a lot of questions, didn't he, about your ability to run an automobile?
A. No, sir.
Q. What?
A. No, sir.
Q. Didn't he ask you if you had ever run an automobile?
A. No, sir. I had a paper that had the questions on.

The Court: Which are you referring to now, the 1911 license, or 1913 license?
Mr. Hartpence: I have specified the 1913 license.

By the Court:

Q. You understand that is the 1913 license, the first license, you understand?
A. Yes.
Q. Mr. Hartpence's questions are all directed to the time when your 1913 license was issued to you?
A. He tested me on the road.

By Mr. Hartpence:

Q. Tested you out on the road?
A. Yes.
Q. He took you out on the road with the machine?
A. Yes.
69 Q. And you ran the machine?
A. Yes.
Q. With the inspector riding with you?
A. Yes.
Q. And he passed you and gave you your card?
A. Yes, sir.
Q. He also gave you a paper with questions on that you had to answer?
A. Yes, sir.
Q. You wrote the answers to those questions, did you?
A. Yes.
Q. Those questions asked you what you knew about an automobile, didn't they?
A. Tell about the law of the road and things like that.
Q. The rules of the road?
A. Yes.
Q. And the mechanism of the machine?
A. Not much about the machine.
Q. There was something about it, wasn't there?
A. Well, I am telling you about how—what you ought to have on machines.
Q. Asked you if you had a puncture what you would do?
A. Puncture?

Q. If you had a breakdown what you would do?
A. Yes.
Q. Those questions were all in that paper?
A. Yes.
Q. Then after you had answered those questions and had gone out on the road with the inspector he gave you the license?
A. Yes, sir.
Q. Now, when you got your 1914 license they did not ask you so many questions, did they?
A. Didn't ask me none.
Q. Just filed a paper asking for the renewal of your license?
A. Yes, sir.
Q. It was renewed for you?
A. Yes, sir.

By Mr. Simpson:

Q. Do you know how high the step was that you tried to reach from the rail, how high up on the locomotive?
A. No, sir.
Q. Have you walked with this cane ever since the time you were hurt?
A. Yes, sir.
Q. Use that all the time?
A. Yes, sir.

70 JOSEPH C. MAHLBECK, sworn.

Direct examination by Mr. Simpson:

Q. Mr. Mahlbeck, what is your occupation?
A. Surveyor.
Q. How long have you been a surveyor?
A. Five years.
Q. Where is your place of business?
A. 927 Union Street, West Hoboken.
Q. Did you at my request go to the Granton yard of the New York Central, and make a map of a portion of the track, and also a map of a sectional portion of that track.
A. I did.
Q. At the switch pointed out to you by Mr. Tonsellito?
A. I did.
Q. Is that the map?
A. That is the map.
Q. Is that a correct map of the switch and the water pipes and the surroundings there?
A. The plan shows the situation, but it may not show the exact part where the switch crosses, but sections of it is exact measurement.
Q. I show you a photograph; is this a photograph of the same thing as you made a map of?
A. Yes.

The Court: Designate the exhibit.
Mr. Simpson: Exhibit 2-P, K.

Q. Showing you a picture of what purports to be a railroad trac and pipe which is looped and a switch, I ask you if that map is correct picture of the scene shown by the photograph?
A. Yes, sir.
Q. When was it made?
A. This was made October 7.
Q. 1914?
A. 1914.

Mr. Simpson: I offer that map in evidence.
Mr. Hartpence: May I see it? (Examines.)
(Paper marked Exhibit P-3.)
71 Mr. Hartpence: May I cross examine?
The Court: Certainly.

Cross-examination by Mr. Hartpence:

Q. When you made this sketch, Mr. Mahlbeck, what time of t day was it?
A. About half past two.
Q. In the afternoon?
A. In the afternoon.
Q. How long a time were you there making your examination a inspection?
A. I was there for about a half an hour to an hour outside; was in the place about ten minutes.
Q. In the place about ten minutes?
A. About ten minutes.
Q. Where were you outside?
A. Out in the street—on the Bergenpike Road.
Q. And this yard is enclosed by a fence, isn't it?
A. Yes, sir.
Q. And the Bergenpike Road is quite high up above the ya isn't it?
A. It is, yes.
Q. And do you know how far it is from where you stood outsi over to this switch?
A. As far as I could judge it was about a hundred feet.
Q. You did not measure it?
A. I did not have time.
Q. You merely judge that that was the distance?
A. About a hundred feet in.
Q. Then you went inside alone, or was some one with you?
A. Some one with me.
Q. Who?
A. Some assistant of Mr. Simpson's.
Mr. Simpson: Gentz.
Q. I understood you on direct examination that Mr. Tonsell showed you the place?
A. No.

Q. How did you know where to go and make this?
A. Mr. Gentz went with me.
Q. Mr. Tonsellito was not there then?
A. No, sir.
72 Q. Neither Michael nor his father?
A. I do not know them.
Q. During the ten minutes that you were actually in there what measurements did you actually make?
A. Measured the height of the rail, the height of the tie beams at that point.
Q. At which point?
A. Shown on the section.
Q. At the switch?
A. No; section A-B marked on the sketch.
Q. Shown at the section A-B?
A. Yes, sir.
Q. The height of the rail from what point?
A. From the top of the tie.
Q. To the top of the rail?
A. To the top of the rail.
Q. Is that indicated on this section?
A. It is shown on the section, and then the height of the rail—not the rail—the height of the tie.
Q. From what point?
A. From the ground, the level of the ground, at that point.
Q. You mean by the level of the ground the level of the ground surrounding ground?
A. The surrounding ground.
Q. On this at that point A-B where you made the section, there was a fill, was there not?
A. What do you mean fill?
Q. Well, the track was raised on cinders which were raised up higher than the level of the surrounding ground?
A. Yes, sir.
Q. Did you measure the height of these cinders from the general level of the ground?
A. I did. It is marked on the plan.
Q. Is that shown on this section also?
A. It is.
Q. And that fill ran all the way along both ways, did it not, from the place where you made your cross section?
A. Yes, sir.
Q. Did you notice where it ended, looking north, looking to the right?
A. I measured it about from the height——
73 Q. From which pipe?
A. From the air pipe shown on the plan.
Q. You mean from the hook of the air pipe?
A. Yes, sir.
Q. How far north did you measure?
A. I judge it to be that point, about thirteen foot and a half.

Q. That was about what—to what switch?
A. Well, it did not quite reach the switch.
Q. Thirteen and a half feet did not quite reach the switch?
A. Yes.
Q. But it almost reached the switch, is that right?
A. Yes.
Q. So, from the point where the air pipe crooked up to the switch, it was about thirteen and a half feet?
A. It was about sixteen or seventeen feet. I did not measure to the switch.
Q. Did you look and judge with your eyes about how far from the switch that fill ran?
A. Well, it ran maybe a hundred feet.
Q. Up to some building up there?
A. Some building.
Q. Did you notice with your eye how far south it ran?
A. Well, it ran quite a distance south, several hundred feet.
Q. Gradually tapered off, didn't it, down to the level of the ground?
A. Yes.
Q. Well, y-u made the actual measurements, did you, with your instruments for the heights at the sections?
A. I made it with a standard tape line.
Q. Anybody assist you?
A. Well, not in the heights. I could do that myself.
Q. What did anyone assist you in?
A. Just showed me where the place was and measured the width of the ties.
Q. Now just one or two more questions, will you state how far it is from the crook of the air pipe in a southerly direction to
74 the point where you indicate the fill?
A. I do not know.
Q. Can you state how far it is northerly to that?
A. No.
Q. You did not actually measure those distances?
A. No; I did not have time to measure it.
Q. And the map—and the section itself on the outline is based really upon your judgment as to distances?
A. Not on the section. These are actual distances.
Q. Every one except at the section?
A. Yes.
Q. What does this irregular line running along the track show?
A. Shows the slope.
Q. That shows the slope?
A. The dirt runs out up to here and then she slopes down.
Q. Does this show the distances from the rail out to the point where it does slope?
A. Does here (indicating). Begins to slope right at the tie itself, and shows at the section here (indicating).
Q. And further south and further north?

A. Why, there is a distance of about a foot and a half where you can walk.

Q. Did you measure that distance along here where you have indicated, or is that your judgment?

A. No, that is measured.

Q. That is actually measured?

A. Yes, measured at those points here and over here (indicating).

Q. Will you indicate the two points where you measured?

A. Right here (indicating).

Q. Mark it out here with X. You also measured there?

A. Right about here (indicating).

Q. At the two points you marked X are you prepared to state those measurements?

A. Yes.

Q. I did not ask you to do it, but I ask you if you are prepared to state that?

A. Yes, I can. This is drawn to an accurate scale.

75 Mr. Hartpence: Well, if the Court please, this seems to be a sketch and section that were made from a general observation of the point which is indicated, from a distance of at least a hundred feet away, at a point where the yard is enclosed with a fence, and very slight measurements were actually taken, and it does not seem to me to have been prepared with that minuteness and accuracy which is necessary to render it admissible as a sketch or section.

The Court: But he has testified, as I understand, that some parts of it are the results of actual measurements. I think I have to agree with you on the part which is produced merely from observation.

Mr. Simpson: That does not go to the competency.

The Court: But only to the part where the actual measurements were taken.

Mr. Simpson: That does not go to the competency. This man says it is an actual picture—whether he made it improperly or properly certainly goes to the weight of the evidence.

The Court: I will admit it.

(Exhibit P-3 placed on easel.)

Redirect examination by Mr. Simpson:

Q. Now will you come down here a minute. What is this marked section A-B and scale one to one. What is that?

A. That is an imaginery cut through the line A-B.

Q. Is the line A-B the second tie from the curved water pipe?

A. Yes.

Q. What is the distance from the bottom of the imaginery cut, being the top of the top rail? What is that distance, from this point down to that?

A. Two feet three inches.

76 Q. Two feet three from the ground to the point——

A. To the top of the rail.

The Court: Suppose you mark that perpendicular distance A-B?
Mr. Simpson: A-D.
Q. Two feet three inches; is that right?
A. Yes.
Q. What is the distance from A to the top of the tie on which the rail rests?
A. One foot ten inches.
Q. That is A-E. I show you this photograph marked Exhibit P-2, K, and ask you to show me where on this photograph that imaginary cross section is made?
A. Right through the center. Through the center of the first two ties. Through the center of these ties.
Q. Through the center of the second tie from the crooked pipe?
A. Yes, sir.
Q. Now you say that you did not have time. What do you mean by that, you did not have time?

Mr. Hartpence: I object to it as immaterial.

Mr. Simpson: I want to show what preparation he gave to the making of this map. Mr. Hartpence has brought that out and asked him if he did not have time, and I want to show it.

The Court: What virtue is there in that? The real question is what he did do.

Mr. Simpson: I will withdraw that question.

Q. Did the employees of the New York Central chase you off this ground before you had a chance to finish the getting of the details for this map?

Mr. Hartpence: I object to it as incompetent, irrelevant and immaterial, and framed for the purpose of prejudicing the
77 jury.

The Court: I will sustain the objection. I do not see the value of it.

Mr. Hartpence: I move for the withdrawal of a juror.
The Court: I decline to do that. I will sustain the objection.

Q. You did say to Mr. Hartpence you did not have time to make it?

Mr. Hartpence: I object as immaterial, irrelevant and not proper cross examination.

The Court: I will sustain the objection and it may be stricken out.

Q. How much time were you on the ground? How long were you on the ground where this track was?

Mr. Hartpence: I object to it as not proper redirect examination. He was asked on cross examination and he said ten minutes.

Mr. Simpson: Mr. Hartpence brought it out.

The Court: That was for the purpose of informing himself as to whether he should object to the offer of the exhibit.

Mr. Simpson: Mr. Hartpence brought out the cross examination.
The Court: I will overrule the objection.

A. About ten minutes.
Q. When did you make your observation of the place from the highway; was it after you were at the track or before you were at the track?
A. Before I was at the track.
Q. Before you were at the track?
A. And afterwards, too.
78 Q. What was it you looked at from the highway, was it the top part, to get material for this, or for this (indicating).
A. To the top part.

EMIL EILERS, sworn.

Direct examination by Mr. Simpson:

Q. Where do you live?
A. No. 619 Fish Street, Union Hill.
Q. What is your business?
A. Machinist.
Q. Did you work in the West Shore yard on the day that Tonsellito was hurt?
A. I did, sir.
Q. Do you know the place of the accident?
A. I do, sir.
Q. How would you describe it? What is it known as in the yard there?
A. That pipe is under my restriction. This air pipe is called the expansion, and right about this locality——

The Court: I cannot hear you.

A. This pipe described is the pipe under my restriction there, called high pressure air pipe, and this bend was called an expansion bend, and between the locality of this expansion pipe and this bend I presume he was hurt.
Q. Between the expansion pipe curve and the switch, were you on that day familiar with that general location there?
A. I was, yes.
Q. How long had you been working in the yard then?
A. Close on three years.
Q. What was the condition of the ground and the track and the ties and the rail where the air pipe curved between the curve of the air pipe and the switch; what was the condition of the ground with reference to height?
A. A large slope.
79 Q. How much of a slope was there?
A. About two feet slope running about forty-five off the horizontal line.

Q. Forty-five what?
A. Degrees. Two foot drop off the center.
Q. Did you see the accident to the boy?
A. I seen him in that falling position, yes.
Q. Just tell the jury what you saw from the beginning until the end, will you?
A. While eating lunch between one and two on this day I was looking southerly and seen an engine approaching, and my attention was drawn to a paper, and on looking by reason of this fellow falling off the engine or what I cannot tell, because the distance was too great, but I seen him in a stumbling position falling on the ground.
Q. What was his position? Had his foot reached the engine step?
A. That was too great a distance to say. I seen him in a standing position, seemed to make an attempt to mount the engine, and I saw him fall.
Q. Did you see him go under the engine?
A. I did not, no sir; the distance was too great to distinguish that.
Q. How far away from the position?
A. I should say around five hundred feet more or less.
Q. Where were you with reference to the storehouse?
A. Opposite to the storehouse.
Q. Did you go down to help him?
A. I did not, no, sir.
Q. Could you tell whether the engine was moving at the time you saw him in the falling position?
A. I could not; no, sir.
Q. Could not tell from the distance?
A. No, sir.
Q. Could not tell whether it was stationary or moving?
A. No, sir.
80 Q. What did you do after you saw him in this falling position?
A. I could not possibly leave my plant, because I was in sole operation at that time, and I stayed there until I got relief and I went down to the machine shop and saw him on the bench.
Q. Did not see him brought from the injury?
A. No, sir.
Q. Did not see who got hold of this man?
A. No, sir.
Q. Did you see the engine before you saw him in the falling position?
A. I saw it approaching; yes, sir.
Q. Where was it when you last saw it before you saw him in the falling position; how near this switch was it?
A. Somewhere about a hundred or more feet, approaching, coming towards that switch.
Q. Did you see it again between that point, that is, a hundred feet away from the switch, that is at the point where you saw him in the falling position?
A. Only while it was standing.
Q. Where was it standing?

A. I presume at the mouth of the switch.

Mr. Hartpence: I object.

Q. You say when it was standing. When you saw it standing where was it?

A. Somewhere around the bend of the pipe, of the expansion.

Q. Where that expansion——

A. Yes.

Q. How long did you see it standing there?

A. An impulse of a few minutes, probably four or five minutes.

Q. Do you mean minutes or seconds?

A. Minutes.

Q. You saw it stationary round this pipe four or five minutes?

A. Yes, sir.

Q. That is before it got to the switch—before it went over the switch?

A. Before it went over the switch.

Cross-examination by Mr. Hartpence:

Q. Where were you, Mr. Eiler?

A. I was eating my lunch outside the boiler house, sort of an extension.

Q. And that boiler house is located north of the switch, isn't it?

A. Yes, sir.

Q. You say about five hundred feet?

A. I believe so; yes, sir.

Q. As you were up at the boiler house you looked up in this direction?

A. Yes.

Q. Were you on the right-hand side of this track or left-hand side?

A. On the right-hand side of the track.

Q. On the right-hand side of the track?

A. On the left-hand side.

Q. On the left-hand side as you look south?

A. Yes, sir.

Q. How far to the left of the track were you?

A. Why, practically—well, left of the track. There the track was—in other words, that is quite a complicated question. The track curved there, your Honor, and I was sitting on the left of the track and looking at the south of the track.

Q. From where you sat were you in a line—would a straight line directly south run to the left of this switch or to the right of the switch?

A. To the left of the switch.

Q. About how much?

A. Direct line to the left of the switch five hundred feet in distance, and I am——

Q. You were not five hundred feet to the left of the track, were you, from where you sat?

A. I am saying that the switch took that S shape. I was sitting

on the right of the track looking at the left of the track. It is a hard thing to distinguish, but I can draw it for you.

82 Q. You were sitting on the right of the track, but you were looking on the left to the track?

A. Yes, that is right.

Q. How much to the left of the track would a straight line run right from your eye directly south?

A. I presume a foot or two. I was sitting—probably right on the track.

Q. You had worked there, you say about three years?

A. Close to three years.

Q. Had you been up and down that track?

A. On rare occasions, yes.

Q. Engines come up and down there all the time?

A. Yes.

Q. Cars were taken up to the storehouse there?

A. Yes.

Q. And the boiler house, and out all the time?

A. Yes, coal cars.

Q. Workmen there working up and down that track all the time?

A. All the time.

Q. That switch was thrown from time to time to send them in the different ways?

A. Yes.

Q. Regular everyday occurrence, wasn't it?

A. Yes, sir.

Q. Are you working up there now, Mr. Eiler?

A. No, sir.

Q. How long since you worked up there?

A. Why, over a year, I believe.

Q. Are you working for the New York Central Railroad at all now?

A. No, sir.

Q. When you left up there you left their employ, did you?

A. I resigned; yes, sir.

Q. Did you know Michael Tonsellito before he was hurt?

A. I did; yes, sir.

Q. You had seen him around there?

A. Yes, sir.

Q. How long?

A. Ever since I had been in the employ of the company.

Mr. Simpson: Talk louder.

83 A. While in the employ of the company I seen him on frequent occasions coming back and forth and in our power-house and around the superintendent's and so forth.

Q. You did not see him get off the engine, did you, at this switch?

A. No, sir.

Q. You did not see him until he was just about to——

A. About ascending the engine.

Q. About ascending the engine?

A. Yes.

Q. What became of the engine after he, Michael, fell—after you saw Michael fall?
A. That I don't know, sir.
Q. Where did you go?
A. Back in the powerhouse.
Q. You did not wait to see which way the engine went?
A. I did not; no, sir.
Q. Did you see the engine at all after that?
A. I did not; no, sir.

Redirect examination by Mr. Simpson:

Q. Mr. Eiler, you told Mr. Hartpence you had seen him about three years around. What did you see him doing in the three years?
A. Why, practically everything in the line of labor, work——

Mr. Hartpence: I object to it as not proper redirect examination.
Mr. Simpson: He brought it out. I want to find out what he saw him doing.
Mr. Hartpence: I object to it as not proper redirect.
Mr. Simpson: He says "How long have you known him. You have known him three years. Where have you seen him? I have seen him around, in and out and all around," and I want to see what he saw him doing.
Mr. Hartpence: My examination was to test this man's power of identifying Michael, just as to whether he had seen him and knew him, and I asked him nothing about——
84 The Court: If you will say that that was your intention——
Mr. Hartpence: That was my only intention.
The Court: And then you limit your testimony on that point to that purpose. Then I will sustain the objection.
Mr. Hartpence: That was my object and purpose.
The Court: Then you declare that all that this witness testified to as to this seeing of the plaintiff in and about the place there was only for the purpose of testing the reliability of the recollection of this witness?
Mr. Simpson: I ask to have an objection to your Honor's ruling on the ground that it is not proper. It is not possible to rule out a redirect question simply on the ground that the counsel will say that is all he wants the testimony to prove, because the jury may say it proves a great deal more, and merely by him stating a purpose is not sufficient to shear the evidence of such qualities as would allow me to examine on it.
The Court: Oh, I think so.
Mr. Simpson: I ask an exception to your Honor's overruling the question.
The Court: My statement and his answer were made in the hearing of the jury, and they are certainly capable of understanding it. You may have your objection.
Mr. Simpson: I ask to be allowed that question as though he was my witness on direct and as though there had not been any question.

Q. What did you see him doing in those three years around the place there?

85 Mr. Hartpence: I object to it as not proper redirect examination.

Mr. Simpson: It is not proper redirect and it is within your Honor's discretion to allow me to ask the questions omitted on direct examination. It is entirely in your discretion.

The Court: All right. I will permit it.

Q. What did you see him doing around in these three years?

A. Everything in general. Laboring work.

Q. What about engines? What did you see him doing about engines?

A. Cleaning and shining lights and filling them and so forth, and firing engines back and forth in and around the roundhouse, pumping them up.

Q. Can you tell us generally how many times you have seen him firing engines before the day of the accident?

A. Probably hundreds.

Cross-examination by Mr. Hartpence:

Q. What did you see him doing on the engines, firing them?

A. I seen him on the steps of the engine, throwing coal in the boiler, and working the injectors and so forth.

Q. Where were the engines?

A. Stored in the roundhouse.

Q. In the roundhouse, weren't they?

A. Yes, sir.

Q. On these other occasions that you have seen him around there, these numerous occasions, had you ever seen him go up and down this storehouse track to the machine shop?

A. I cannot say I did; no sir.

Q. You saw him chiefly in and around the neighborhood of the roundhouse?

A. Yes, sir.

Q. And on the tracks, the spurs that run out from the

86 roundhouse?

A. From the roundhouse; yes, sir.

Q. On which the engines stand, isn't that right?

A. Yes, sir.

Redirect examination by Mr. Simpson:

Q. These spurs are spurs that engines are brought out from the roundhouse outside on?

A. On to the turntables.

Q. And they are brought out under their own steam?

A. The majority of them, yes.

By Mr. Hartpence:

Q. Do they come to a dead end at the turntable or just beyond?

A. They go to the turntable; yes, sir.

FREDERICK WENDT, sworn.

Direct examination by Mr. Simpson:

Q. Mr. Wendt, where do you live?
A. 521 Blum Street, Town of Union.
Q. How long have you lived in this country?
A. Last forty-five years.
Q. Did you work for the New York Central in June, 1912?
A. I did.
Q. Were you working for them on the 23rd of June, 1912?
A. Yes, sir.
Q. What were you doing on that day?
A. Airbrake inspector.
Q. Had you seen this boy Tonsellito around the roundhouse at Granton or on the outside of the roundhouse while you had been employed there before the 23rd of June?
A. I did.

87 Q. Well, say, take a year before that time, what had you seen him doing, if anything in and around the roundhouse, and out of the roundhouse?

A. Rubbing machines and laboring around and cleaning up and wiping engines.
Q. Anything else?
A. Pumping engines; took care of them.
Q. What do you mean by taking care of them; what would he do?
A. Keep water in the boilers and keep fire in the engines.
Q. How would he keep fire in the engines?
A. By putting coal on.
Q. Putting coal on?
A. Yes.
Q. How many times have you seen him do that?
A. Yes; all of a hundred times.
Q. Who was with him when he would do that—anybody on the engine, any man that was known as a hostler or anything of that kind?
A. Not around the shop.
Q. But on the outside, when the engines were taken out of the roundhouse to the turntable, who would do that? Would he do that or someone else?
A. No, the hostler.
Q. Well then, who would be firing the engines and keeping up fire and steam while the hostler took it outside to put it on the turntable?
A. If she had steam enough in her and fire enough in her to last.
Q. If he did. You saw Tonsellito on the machine?
A. Yes, sir.
Q. Tell us what you would see him do if anything, when the hostler would take them outside?

A. Well, he would be getting on there and shoveling coal or some thing like that, on to the fire, that is all I seen.

Q. That is while the hostler was taking it out?

A. While the hostler was taking it out.

Q. Where would the hostler bring them out when he would tak them out?

A. Right out to the tool room.

88 Q. Tool room; where was that?

A. About a hundred feet or more outside of the turn table.

Q. Who was the foreman around the yard during the time th you were there and Saw Tonsellito doing these different things th you have stated?

A. Mr. O'Connor.

Q. Have you ever seen Mr. O'Connor around near enough Tonsellito to see him when he was doing these different things th you have stated?

Mr. Hartpence: I object.

A. Yes.

(Objected to as calling for a conclusion. Question withdrawn.

Q. How near was O'Connor to Tonsellito when you saw Tons lito doing these different things, firing engines, wiping engin keeping up steam—how near did you see O'Connor to him on th occasions?

A. Some days seen him right close by and sometimes further awa just where he happened to meet him around the place.

Q. Where was O'Connor's general position during these times? Where would he be doing his day's work around the works?

A. Yes, all around the roundhouse.

Q. Where was O'Connor's office?

A. Why, this end of the—west of the roundhouse.

Q. Where did you work generally?

A. I worked——

Q. Near his office?

A. Ashpit inspection.

Q. That is around where the inspection was?

A. Yes.

Q. These engines that you have described being brought out the roundhouse by the hostler, how near would they pass to O'C nor's office?

A. Why, right past the door.

Q. Right past the door?

A. Yes.

89 Q. Who gave the orders around the shop?

A. Why, Mr. O'Connor.

Q. He was the man in charge, was he?

A. General foreman.

Q. Did you know a man named Ohr when you worked there?

A. Yes.

Q. What did Ohr do; what was he?
A. Hostler.
Q. What was the hostler; what did he do?
A. Supposed to bring engines in the house and take them out when they are ordered.
Q. Take them in and take them out? On the 23rd of June, 1912, who was the hostler there then, Ohr?
A. Yes, sir.
Q. Did you see any of this accident yourself?
A. No, sir; I did not.
Q. Where were you?
A. I was on the inspection trip.
Q. How near was it to this switch?
A. About two hundred feet.
Q. Were you there at the pit at the time of the accident?
A. Yes.
Q. That is you were only two hundred feet away?
A. Yes, sir.
Q. You saw this engine then, didn't you?
A. Yes.
Q. Well now, what did you see, if you did not see the accident? Will you tell the jury just what you saw prior to the accident and subsequent to the accident?
A. Well, the engine stopped there right across two hundred feet from my distance—I was eating my dinner at the time.
Q. I could not hear that. Will you tell us that over again?
A. I say I was two hundred feet away from the engine at the time she stood there when the accident happened. I was eating my dinner at the time.
Q. You were eating your dinner?
A. Yes, sir.
90 Q. When she stopped what did you see, if anything?
A. I seen lots of them running over there, and I was just looking over there and I didn't see anything else.
Q. Could not see anything else?
A. No, sir; because I was on the left side and she was on the right side.
Q. Did you see her as she approached the switch?
A. Yes.
Q. Did you see how near she got to the switch before she stopped?
A. She stopped this side of the switch.
Q. That is before she reached the switch?
A. Yes.
Q. How far before she reached the switch? How far away from the switch was she when she stopped?
A. About two or three feet.
Q. Did you see the boy Tonsellito at all?
A. No, I could not see him.
Q. Could not see him?
A. No.

Q. Where was the engine when you first saw it or you saw it proaching that switch?

A. I see it standing there then.

Q. You saw her when she was standing. You did not see her she came up to the switch?

A. I saw her come up, but I did not see her stop there at time.

Q. Were you watching her all the time?

A. Well, I did not just put my eye on her, but I seen her wh she stopped dead and go on.

Q. When she stopped dead?

A. Yes, sir.

Q. Was that the time that the people all ran?

A. Yes; that is the time of the accident.

Q. You don't know whether when she came up and she stop before she made the dead stop or not?

A. She made a dead stop.

Q. I know she did, but was that the time when the people ran?

A. Yes, sir.

91 Q. Before she made her dead stop, as she came up to switch, do you know whether she stopped before she made dead stop, or weren't you watching her at all?

A. I seen her coming, but I didn't watch the stop.

Q. Did you see her stop to throw the switch before she made dead stop?

A. Yes, I saw her stop.

Q. I know, but what kind of a stop was it? Was it the fi when everybody ran, when the boy was hurt, or was it before was hurt that you saw the stop?

A. He stopped to throw the switch.

Q. You saw him stop to throw the switch? Well then, how l after that did you see the people run?

A. Well, then I did not look right away and after awhile I her standing there yet and I seen them all running.

Q. What interval of time was there between the time she stop to throw the switch and you looked upon and saw her still stop and saw the people running? What time occurred?

A. Four or five minutes there.

Q. Then what did you do, if anything?

A. I walked over there after a while.

Q. You did not go over right away?

A. No.

Q. When you got there where was this boy?

A. They was taking him over to the machine shop.

Q. He was in the machine shop?

A. Taking him over.

Q. You did not help to carry him?

A. I did not. I did not help to carry him.

Q. When you got there afterwards you found him in the chine shop?

A. Yes.

Q. You did not find him lying alongside of the engine?
A. No.
Q. Where was that machine shop?
A. That is five hundred feet from there or more.

92 Cross-examination by Mr. Hartpence:

Q. You were over to the ashpit, Mr. Wendt, you say?
A. Yes.
Q. That is over near by this engine 858, isn't it?
A. Yes, and I was here.
Q. In Exhibit P-1; that is where you were, over near that engine?
A. No.
Q. That is the ashpit, isn't it?
A. Yes, but I was over from the ashpit, on this end of it.
Q. On the right of it?
A. Yes. That building was not there at that time of the accident.
Q. You mean this building on Exhibit P-2 with the white shirt tacked on it; is that the building?
A. Yes; that is the bench there I was sitting on at the time of the accident.
Q. That bench is located right in to the left of that building, isn't it?
A. Yes, facing south.
Q. Which way were you looking?
A. Over towards this way.
Q. Over towards the storehouse track?
A. Yes.
Q. You were seated there eating your dinner?
A. Yes.
Q. What time of day was it?
A. About half-past twelve.
Q. What is the dinner hour?
A. Between twelve and one.
Q. Therefore I suppose everybody eats their dinner between twelve and one?
A. Well, if we haven't any work in the pit. We work twelve hours.
Q. Where is the tool house; does that show on Exhibit P-2?
A. No, don't show there.
Q. As you sat there, eating your dinner, looking over towards this storehouse track, you saw this engine 3791 coming up——
A. Yes, sir.
Q. —the storehouse track; is that right?
A. Yes, sir.
Q. Was she running fast or slow?
A. Slow gait.
93 Q. Making any noise?
A. Yes. Oh, yes.

Q. Ringing the bell?
A. Yes.
Q. Blowing the whistle?
A. No; I did not hear the blowing of the whistle.
Q. The bell was ringing?
A. No: the bell was not ringing. No bell ringing.
Q. You took particular notice of that; the bell was not ringing?
A. Yes, no bell was ringing.
Q. You say as the engine was headed up the track you saw the left-hand side of the engine; that is the fireman's side?
A. Yes, sir.
Q. You could not see the engineman's side of the engine, could you, from where you sat?
A. No, sir.
Q. You could not see this switch on the storehouse could you?
A. No, not while the engine stood there.
Q. You could not see this curve in the air pipe, could you, from where you sat?
A. No, not while the engine stood there.
Q. What was your business there?
A. Air-brake inspector.
Q. How long had you held that position at the time Tonsellito was hurt?
A. I held it there about a year then.
Q. Are you still in the same position?
A. Yes, sir.
Q. Where?
A. Pennsylvania road.
Q. Not working for the New York Central now, are you?
A. No, sir.
Q. How long have you been working for the Pennsylvania?

(Objected to as not proper cross examination. Question permitted.)

Q. As you tested the airbrakes what part of the Granton yard would your duties require you to go?
A. In the ashpit.
94 Q. At the ashpit; is that where the test was made always?
A. Yes, sir.
Q. Where is the roundhouse located with relation to the ashpit?
A. About four hundred or five hundred feet or more.
Q. North?
A. Yes, sir.
Q. When you saw O'Connor up by his office would you be down here at the ashpit?
A. Yes, sir.
Q. When you saw Tonsellito on the engine with Ohr up there where O'Connor was located, you would see him from the ashpit, is that right?
A. Yes, sir.
Q. You were too far away to hear what they said?

A. Yes, too far away.
Q. And you usually saw them when they were right up there by the office, up to the roundhouse, didn't you?
A. Yes, sir.
Q. This engine came up the storehouse track and you saw it stop and then you saw the people running; is that correct.
A. Well, she might have started, but I did not just see her when she started; I see after it stopped again, and I was sitting—I could not see whether she started or didn't.
Q. You saw her come up and stop?
A. She stopped there.
Q. And you looked at her?
A. I started to eat my dinner; I did not look over there right away, for five or six minutes.
Q. Then you saw people running?
A. She was still standing there.
Q. Did you see who was there?
A. I don't remember who was there.
Q. Did you see anybody on the engine when she first came up and stopped?
A. Mr. Ohr.
Q. You saw Ohr, did you?
A. I saw Ohr, and saw Tonsellito.
95 Q. Where was Tonsellito when you first saw him?
A. He was on the deck.
Q. What do you mean by the deck?
A. That is on the deck floor of the tank.
Q. On the floor of the tank right directly back of the fire box?
A. Yes, sir.
Q. About midway between the fireman's seat and the engineer's seat?
A. Yes, in the gangway.
Q. Did you see what he did after he came up and the engine stopped?
A. No, I did not see him.
Q. He was still on the engine when you saw him?
A. Still on the engine, yes.
Q. When did you next see him?
A. I didn't see him until after he got hurt.
Q. Where was Ohr when it came up to a stop?
A. On the right-hand side.
Q. Right side of the engine?
A. Right side of the cab.
Q. Could you see him from where you were?
A. Yes, sir.
Q. Did you see anybody else on the engine?
A. No.
Q. When did you next see Ohr?
A. I saw him right-hand of the engine.
Q. All the time it stood there?
A. Yes.

Q. Saw him all the time that it stood there?
A. It stood there quite a while after the accident.
Q. When you said she came up and stopped and that you saw the people running, did you see him on the engine all that time?
A. I don't remember where he was.
Q. Of course you did not see Michael attempt to get on the engine, did you?
A. I did not.
Q. The engine was between you and him. That's all.

96 Redirect examinataion by Mr. Simpson:

Q. From the first time you saw the engine come to a stop, which you have called the stop to throw the switch, until the time you looked up a second time and saw the people running, how much time elapsed?
A. About five or six minutes or more.

Recess.

Mr. Simpson: I want to read the testimony of the witness Albert W. Gayman, who was the engineer of the Continental Limited. The last time it was put off I said I should not, and I do not want to bring him back, and Mr. Hartpence agreed to put in the testimony.
The Court: There is no question but that comes in the stipulation?
Mr. Hartpence: Yes.
The Court: It may be entered on the record that the defendant consents to the reading of the testimony.
(Mr. Simpson read the testimony of Albert W. Gayman as follows:)

"ALBERT W. GAYMAN, recalled:

Direct examination by Mr. Simpson:

Q. Is that in your handwriting?
A. Yes, sir.
Q. Will you tell me where you took your engine and at what time you took it on the 23rd of June, 1912?

Mr. Hartpence: I object, unless the particular trip upon which he took it is specified.

"Q. I am referring to the testimony already given by the
97 witness that he was engineer of the Continental Limited that left at 2:35 in the afternoon at Weehawken."

Mr. Simpson: Do you want all these objections read—the objections that you made?
Mr. Hartpence: I do not think so, Mr. Simpson—all right; I will admit it.

"A. Where I got on the engine?

Q. Where you took it from by that slip?
A. I took it from Granton back to Weehawken.
Q. The Granton roundhouse?
A. Yes.
Q. When?
A. Out at 1:45.
Q. What was the number of the engine?
A. 3791.
Q. 3791. Where did you take it from the Granton roundhouse?
A. I suppose——
Q. Look at that slip; is that in your handwriting?
A. Yes.
Q. You said, "Time of leaving yard 2:58;" is that correct?
A. 2.38.
Q. Is that correct?
A. That means Weehawken.
Q. Is that correct?
A. I should think it would be.
Q. It is in your handwriting. You wrote it down. Do you write things down?
A. 2:38, that is what I said. Correct.
Q. Where did you go with that when you left the yard? Where did you go with it? Where did you go with this engine?
A. Answer it?
Q. Yes.
A. Where did I go? I go to Ravina, New York.
Q. What did you pull that day, what kind of a train? Passenger train or freight train?
A. Passenger train.
Q. Have you any doubt about it?
A. No, sir. All right.
Q. When you got this engine out of the roundhouse at 1:45 steam was up in her, wasn't it?
A. Certainly was.
Q. Certainly was. Do you know how much steam was in her; what pressure?
A. No, sir.
Q. Who got on the engine with you?
A. Charlie Brown, the fireman.
Q. Is he your fireman?
A. Yes.
Q. What did you do with that engine when you got to Ravina?

(Question withdrawn.))

Q. What does that mean, "Time wanted?"
A. It was supposed the scheduled leaving time of the train at Weehawken.
Q. 2:38?
A. 2:30.
Q. And you left at 2:38?
A. Yes, that is as I understand it.

Q. Isn't this the same figure there? Isn't that 8? Isn't that the same figure as that?

A. No, I think that is 8 there. It has been rubbed here so you can't tell: It is there 2:30, but we probably left a few minutes late. We run number one. 2:30 was the scheduled time for leaving of that train."

EDWARD J. CLIFFORD, sworn.

Direct examination by Mr. Simpson:

Q. What is your business?

A. I am a brakeman.

Q. How long have you been a brakeman?

A. About three years.

Q. Where have you worked as brakeman?

A. On the Pennsylvania Railroad and the Central Railroad of New Jersey.

99 Q. In yards located in Jersey City?

A. Yes, sir.

Q. That is in the County of Hudson?

A. Yes, sir.

Q. Have you become familiar with the condition of the roadbeds within those yards?

A. Yes, sir.

Q. As a brakeman has it been necessary in following your occupation to get on and off trains near switches?

A. Yes, sir.

Q. And to throw switches?

A. Yes, sir.

Q. Now have you become familiar with the general custom of the railroads that you have named in keeping the condition of their roadbeds up?

A. Yes, sir.

Q. At places near switches?

A. Yes, sir.

Q. Now, I show you a picture marked Exhibit P-1-K, and ask you to look at the portion supposedly the portion of the roadbed between the curved water pipe and the switch? You see that?

A. Yes, sir.

Q. Assuming that there was a distance of two feet between the top of the rail and the bottom of the ground as shown in this picture—and I also invite your inspection of a picture marked Exhibit P-2-K, which seems to be lighter in tone, and ask you to look at the portion, seemingly a portion of roadbed between a curved water pipe and the switch, and also telling you in addition that, assuming it to be a fact, that is two feet between the top of the rail and the foot of the roadbed there—the ground—what would you say as to that roadbed two feet below the ground being in good or bad condition with reference to persons getting on and off trains at that point?

Mr. Hartpence: I object on the ground that it is incompetent,

irrelevant and immaterial, and this witness has not been
00 qualified to express an expert opinion on that plan, and that there has been no basis for the relative comparison as fixed etween this and the conditions this witness has become familiar with n other roads.

Mr. Simpson: I invite your Honor's attention to the case of Buck- ut, in 31 Vroom, which lays down the rule for qualification of an xpert. I have shown that this man is familiar with conditions of oadbed, and he has worked as a brakeman for three years and he nows what those conditions were, and certainly then he is qualified o state whether this is a good or bad roadbed.

The Court: By comparison with other standards?

Mr. Hartpence: Yes.

The Court: I understood from Mr. Hartpence's objection that that as one of the objections that he was urging.

Mr. Simpson: I have not asked him about standards. I asked im for an opinion as a man familiar with general roadbeds, as a rakeman for three years, whether this is a good or bad roadbed.

The Court: What is the measure, Mr. Simpson? Isn't it by that hich is a standard?

Mr. Simpson: What he knows in his experience. If your Honor hinks I should prove the roadbeds w-ere he has worked, I will with- raw that question and ask him this one.

The Court: You should do that, aside from the question of the bjection as to whether or not he has been properly qualified. I will ot pass on that for the present. I think the objection is good, in hat it ought to be shown what the standard conditions are in those yards where he has had experience.

01 Q. In these yards where you have had your experience what is the condition as to whether the roadbed is level with he ties or not at points near switches and at points where it is cus- omary to get on and off trains?

Mr. Hartpence: I object on the ground that it is incompetent, ir- elevant and immaterial, unless it is shown that those conditions are imilar to the conditions in the Granton yard, which would require ills and embankments—otherwise the yards that this man has been n may be strictly simply level yards.

Mr. Simpson: I do not think so, because there is no proof that here *is* any fills or anything else required. There is no proof in his case of anything except that this was a railroad track and a witching yard. There is no proof that fills were required. I can- ot show by this man's experience in the Granton yard.

The Court: True, but there is proof, as I would call it, that this rack was upon a fill.

(Question repeated.)

The Court: I will overrule the objection to that.

Q. What is your answer?

A. Every yard I have worked in—I have worked in a filled yard in Greenville—that is a fill in the yard at the Greenville work,

and I have worked in the Cove and I have worked in the Communipaw, and I have always found you always get on and off trains, going at an average of ten and twelve miles an hour, and when you get on again without the trouble——

The Court: That does not answer the question. Strike it out.

102 (Question repeated.)

Q. What is the condition of the yards where you have worked—you say filled in, and yards that were not filled in—with reference to the dirt being level with the ties?

A. Always found them pretty near the same.

Q. Pretty near level?

A. Pretty near level.

Q. Have you ever found any of these yards where you have worked, filled in or otherwise, the ground two feet, from measurement, from the top of the rail down to the ground?

A. No, sir.

Mr. Hartpence: I object to it as incompetent and immaterial.

The Court: What is the specific reason?

Mr. Hartpence: It is merely calling on this witness to state whether or not he has found certain conditions in certain yards. As to whether these certain yards required the condition that may have been required in the Granton yard, does not yet appear.

Mr. Simpson: That is for cross examination. It seems to me I am entitled to prove the general custom.

The Court: I will overrule the objection.

(Answer repeated.)

Cross-examination by Mr. Hartpence:

Q. What has been your particular business, Mr. Clifford?

A. Brakeman.

Q. Did you ever build a railroad track?

A. No, sir; I never did.

Q. Ever construct a right of way of a railroad?

A. No, sir.

Q. Repair one?

A. No, but I have——

Q. Have you ever repaired one?

A. No, sir.

Q. Never had anything to do at all with the constructing or building of a road?

A. No, sir; I was a brakeman.

Q. In what yards did you work?

A. Greenville, on the Pennsylvania—worked in the Cove
103 in the Pennsylvania Railroad, and worked in Communipaw here for the Central Railroad.

Q. Is it a fact that in none of these yards you find a track that is elevated more than two feet above the level of the ground?

A. No, sir; I never have. All yards are the same.

Q. All yards are the same?

A. Yes, but I don't know about the road work, I have never done any road work.
Q. The tracks are all level in those yards?
A. Yes, sir.
Q. There is no necessity for the tracks to be elevated above the ground?
A. No, sir.

GEORGE F. HILLARD, sworn.

Direct-examination by Mr. Simpson:

Q. Mr. Hilliard, what is your business?
A. Brakeman.
Q. How long have you been a brakeman?
A. Three years, and two years throwing switches.
Q. Where have you worked as a brakeman?
A. Pennsylvania Railroad.
Q. Any other yard here beside the Pennsylvania?
A. Meadow yard.
Q. What is the Meadow, Pennsylvania?
A. That is the Pennsylvania.
Q. Any other yard?
A. And the Cove and in the Jersey City yard.
Q. In those yards what did you do, what was your work in those yards?
A. Worked around the cars, braking and switching.
Q. Were those yards used for switching and braking?
A. For switching and braking.
104 Q. In that work was it necessary for you to get on cars in motion and get off cars in motion?
A. Yes, sir.
Q. In those yards at the time that you worked there what was the condition of the roadbed in the yards with reference to the rail? Was it even with the ties or was it down two feet lower than the ties?
A. Even with the ties——

Mr. Hartpence: I object to it as incompetent and irrelevant.
The Court: I will overrule the objection.

A. About even with the ties.
Q. Have you ever found in any of those yards where they used the yards for switching cars and braking work, that the ground was two feet lower alongside the ties than the rail?
A. No, sir.

Cross-examination by Mr. Hartpence:

Q. Where did you work, Mr. Hilliard?
A. Pennsylvania Meadow yard, and Cove and Jersey City freight yards.
Q. Those yards are all level yards?
A. All level yards.

Q. No necessity to have fills?
A. No; well, the meadows yard is filled.
Q. What say?
A. The meadows is filled in.
Q. But where the tracks are it is all level?
A. All level with the ties.
Q. Many tracks there?
A. No.
Q. How many tracks do you suppose there are across the Meadows yard?
A. How many tracks in the yard?
Q. Yes.
A. Why, there is twenty-four in one yard—there is two or three sections of the yard.
Q. Side by side?
A. Yes, sir.

By Mr. Simpson:

Q. That is a filled in yard?
A. Yes, sir.

105 By Mr. Hartpence:

Q. The whole yard is filled in?
A. Yes, sir.
Q. From side to side?
A. Yes, sir.

FREDERICK OHR, sworn.

Direct examination by Mr. Simpson:

Q. What is your business, Mr. Ohr?
A. Hostler.
Q. Where are you employed?
A. New York Central at Granton.
Q. Were you a hostler on the 23rd of June, 1912?
A. Yes, sir.
Q. How long have you been a hostler?
A. A. From eight to ten years.
Q. What was your duty as a hostler; what did you do?
A. Handle engines.
Q. Took them out of the roundhouse?
A. Yes, sir.
Q. Took them out to wait in the yard for the regular engineer to take them?
A. Yes, sir.
Q. Now, on the day of the accident did you have this engine 3791?
A. Yes, sir.
Q. Where were you going with it?
A. To the storehouse after a barrel of oil.
Q. Did you get the barrel of oil?
A. Yes, sir.

Q. Where was that barrel of oil to go?
A. Ravina.
Q. New York?
A. New York.
Q. What kind of oil was it?
A. I don't know.
Q. Did you see it at all?
A. What the barrel?
Q. Yes, the oil.
A. I saw the barrel.
Q. Not the oil?
A. No.
Q. Was there any mark on the barrel as to what kind of oil there was?
A. I presume there was. I did not see it.
Q. You did not look at it? Now what did you do with the
106 engine after you got the oil on it up at the storehouse?
A. Took it back to the roundhouse.
Q. And left it in the yard?
A. Yes.
Q. Did you see it taken away by Mr. Gayman?
A. I did not see it go away; no, sir.
Q. But you left it for him to take away, didn't you?
A. Yes.
Q. Was there steam up when you left it?
A. Yes.
Q. How much steam was up on it?
A. About 180.
Q. 180 pounds? Well, assuming that that engine was a dead engine, the fire was out when you got hold of it, how long would it take to get steam up?

Mr. Hartpence: I object on the ground that it calls for an expert opinion of this witness.

Q. You have worked upon engines, haven't you, a long time as a hostler?
A. Yes.
Q. You have seen them fired, haven't you?
A. Yes.
Q. And seen a man start fires and seen the steam get up?
A. Yes.
Q. How long would it take to produce steam in an engine, assuming that the engine was a dead engine when you got hold of it?

Mr. Hartpence: Objected to unless it is further shown that the engine- this man has had experience with are engines of a similar type of construction.

Q. Have you had experience with engines of a similar type to 3791?
A. Yes, sir.
Q. How much experience?

A. Oh, from eight to ten years.

107 Q. How long would it take to get up steam if the engine was dead cold when you got hold of it, no fire in it?

A. Well, it takes different times.

Q. Well, this engine 3791, suppose that the water was cold and the fire was out and you had to light the fire and make steam, how long would it take—180 pounds?

Mr. Hartpence: Objected to as incompetent, irrelevant and immaterial, and that there is no proof in this case to show this engine was dead cold at the time the steam was gotten up.

The Court: I sustain the objection.

Q. When you left the engine she was up to one hundred and eighty pounds, was she?

A. Yes.

Q. Was there a fire under her when you left her?

A. Yes.

Q. What is it necessary to do to raise the steam from eighty to one hundred and eighty pounds? What was necessary to be done?

A. Why, blower and hook—hook the fire up a little bit, shovel a little bit of coal in and keep the doors shut.

Q. If that was not done it would stay at eighty pounds or go lower, would it?

A. Well, it might and it might not.

Q. Well, when you say getting up steam, what do you have to do to increase the steam? Just what you have described, hook the fire, put the blower on and shut the door, is that what you have to do?

A. Yes, sir.

Q. Up to what point could you get steam on that engine?

A. Why, you get up to two hundred pounds.

Q. Would one hundred and eighty pounds be sufficient for hauling out this Continental Limited?

A. Why, yes.

Q. What amount would be sufficient—up to what amount?

108 A. From about one hundred and fifty to two hundred.

Q. She could not run under that?

A. She might.

Q. Could she run with one hundred and twenty pounds?

A. Yes, after they get going.

Q. If she did not get going, I mean to go down and get her train, is it necessary to have one hundred and fifty pounds?

A. I don't know.

Q. You don't know?

A. No; I have not had the experience.

Q. What?

A. I never had the experience.

Q. But you know she had to have steam up, don't you?

A. Why, yes.

Q. And if the fire was not hooked up and new coal put on and blower, and the fire went out, the steam would go down, would it

A. It would if the fire burned out, yes.
Q. If the fire did not get new coal it would burn out, wouldn't it?
A. It would, yes.
Q. And the place that you left her was the regular place for the engineer to take her, wasn't it?
A. Yes.
Q. Where was this barrel of oil put on your engine?
A. On the back of the tank.

(No cross-examination.)

JAMES TONSELLITO, sworn.

Direct examination by Mr. Simpson:

Q. You are the father of Michael Tonsellito?
A. Yes, sir.
Q. How old are you?
A. Fifty-three.
Q. How old is the boy?
A. Nineteen.
Q. When was he nineteen?
A. Will be this month.
109 Q. What?
A. He will be this month.
Q. He will be this month nineteen?
A. Yes.
Q. Then he is not nineteen years?
A. No, sir.
Q. He is not nineteen yet?
A. Well, he will be on the 17th of this month.
Q. Of October?
A. Yes, sir.
Q. Nineteen years old?
A. Yes, sir.
Q. Since he has been hurt has he been living with you?
A. Yes.
Q. Has he been working since he was hurt?
A. Why, didn't do work—he can't do nothing, except the automobile—once in a while he get a dollar or maybe two dollars—very little he gets—the rest I have to support himself.

Mr. Hartpence: I object.
The Court: I don't hear what he says.
(Answer repeated.)

A. I have to support himself; he can't do nothing.

The Court: That part, I suppose, is not strictly responsive.
Mr. Hartpence: No, sir.
Mr. Simpson: That is my objection.
Mr. Hartpence: It is his objection, but at the same time it strikes me it is hardly testimony that could be allowed to remain on the record.

The Court: It is not of enough importance.

Mr. Simpson: No, it is not of enough importance.

Q. What did he earn at the time he was hurt? How much did he earn when he was hurt?

A. How much he was get-?

Q. Yes?

A. Why, they get—first start he got——

By the Court: No; at the time he was hurt how much
110 was he earning—at the time he was hurt?

A. At the time he was hurt about fifty-five—fifty and fifty and fifty-five because he has a gang and he——

The Court: I cannot understand that. The first answer seems to be fifty to fifty-five a month.

A. Yes, sir.

By Mr. Simpson:

Q. You say he earned fifty-five dollars a month or forty-five?

A. The first time he brought forty-five.

Q. No, but when he was hurt?

A. At the time he got hurt fifty and fifty-five he drawed.

Q. You know this Granton yard?

A. Yes, sir.

Q. Do you know this switch where you say he was hurt which is on the track to the storehouse? You know that switch don't you?

A. Yes.

Q. You know the ground around that switch, in back of that switch, don't you?

A. Yes, sir.

Q. Are there any other switches in this yard besides this switch?

A. Why, yes, you got a lot of switch- in the yard.

Q. That is all I asked you. Are there any other switches in the yard?

A. Yes, sir.

Q. Have you seen these other switches?

A. Yes, sir.

Q. Before the day he was hurt?

A. Yes, sir.

Q. Were you working there on the day he was hurt in the yard?

A. Well, I was working in the morning; the time he got hurt I was not there.

Q. What was the condition of these other switches, compared with this switch near which he was hurt, with reference to the ground?

Were all the other switches above the ground or was the
111 ground level with the switches, or what was the condition?

(Objected to as incompetent, irrelevant and immaterial, unless it is shown that conditions were similar where the other switches were as existed at the place of this switch.

The court sustained the objection.)

Q. You knew the other switches in the yard, didn't you, the witches on other tracks?
A. I know the switch in that yard.
Q. How many switches are there in the Granton yard?
A. On that track there is——
Q. Not on this track. I mean the whole yard?
A. Well, I cannot count so many switch-; I could only count here it goes to the storehouse track for the shop—go to the storehouse track—that is all I can count.
Q. There are more switches on this track?
A. Yes, sir.
Q. Two other switches on this same track, aren't there?
A. There was more switch- for the shop, go to the storehouse.
Q. Take the switches on this track, there were four switches?
A. Four switches.
Q. Take the other three, not this one where he was hurt, but he other three, how were they with reference to the ground alongside of the track? Was the ground level or was it not level on the ther three switches on the same track?
A. Two switch- by the shop, one the same as the shop, and the ther by the shop is level and to where they got hurt is a little different, little ways from the other, that is way down—it is two feet eep there.
Q. That is the only switch on this track where there is a fill of wo feet?
A. There is two switch- there.
12 Q. Is this the only switch on this track where he was hurt where there is a fill of two feet?
A. Why, the one above and one above—two switch- there. Come ere. (Indicates photograph.) Here is switch over here and here. mean as between here, this all low.
Q. You say this switch here, this water pipe?
A. That is water pipe.
Q. Where is the switch?
A. Air pipe.
Q. Well, is there a switch here?
A. Why there is—no, the switches is over here—see—it goes over ere. All this line in there——
Q. I understand it is all slag. What I understand is, this, there re other switches on this track?
A. Yes.
Q. How many more besides this one?
A. Well, there is four altogether.
Q. Well, where are the four, down this way?
A. Well, they started at the shop. Where they start, the shop lace, I can't say—that is the shop—that goes to the storehouse.
Q. Yes; that goes to the storehouse?
A. Now, there should be another switch here, and that is air ipe, and here is very deep, two feet deep between here, is about wo feet deep, and betweeen here that slag, come this switch and

then comes level to go to the power house, another track goes to the storehouse.

Q. Is it level up there?

A. This one going to the power house is high, because they have got slag——

Q. Is it level?

A. Oh, they are level.

Q. How about this here, is it level down here?

A. Yes, below there, be level there.

Q. Then this is the only place here where there is two feet of hole?

A. That two feet hole there.

113 Cross-examination by Mr. Hartpence:

Q. Right there where that two feet hole is, Mr. Tonsellito, is where the air pipe curves around, isn't it?

A. Yes.

Q. And then there is a big stick under the air pipe, isn't there, down in the ground, to hold it up, right there?

A. I don't take notice of the stick. I know the pipe because I was there at the time they put it up.

Q. On Exhibit P-1, this is the air pipe curving around there?

A. Yes.

Q. That rests on that stick down there in the ground?

A. I never took notice about the stick, whether it is a stick or on top of the tie, I would not say.

Q. And along on this storehouse track where you say it is two feet down to the ground?

A. Right here.

Q. Right at that point?

A. Yes, sir.

Q. There by the air crook?

A. By the air pipe, yes, and then comes deep and then comes level up here, and this goes to the power house and this goes to the storehouse—this level with the storehouse, right level, and this is the power house that goes.

Q. And then level there, too?

A. Level both sides, only the track goes slanting to go to the power house.

Q. And it is filled in there?

A. Yes.

Q. In order to get up to the power house?

A. Yes.

Q. And it slants or slopes down gradually, down to the machine shop; is that right?

A. No; the machine shop it goes as far as here, and then this hole between here and here.

Q. When it goes beyond that and on down to the machine shop?

A. Below here it gets level again.

114 —. It gets less and less?

A. Level and level, to go to the machine shop.

Q. Right up here by this switch marked two X's on exhibit P-1, there it is level again?

A. Well, it start- getting level from here and then level and level as far as here and then goes to the machine shop.

Q. Where were you, Mr. Tonsellito, when Michael was injured?

A. Well, I was at home. I left at twelve o'clock. I was working half a day on Sunday. I went over to work four o'clock in the morning and do my work—I was cleaning office there, and after I done my work, why, then I go home the rest of the day, afternoon.

Q. Twelve o'clock was the end of the day?

A. Twelve o'clock I left.

Q. How many hours did you work a day there?

A. Well, I was work four o'clock in the morning until twelve.

Q. Michael went to work at what time?

A. Why, four o'clock he come down with me.

Q. And he was through at twelve?

A. No, he was not through. He got to work all day himself, because he was working on two jobs?

Q. How late did he work that day?

Mr. Simpson: I object to it as not cross examination, and incompetent, because this witness had no knowledge of how long his son had worked, and I object on the ground it is not proper cross examination, and second, there is nothing in this witness's testimony that indicates he knows anything about it.

The Court: I do not see how it is cross examination.

Mr. Hartpence: He has already stated that he was not there when the accident happened, and I wanted to ascertain where he was.

115 Mr. Simpson: I did not bring that out. It is not proper cross examination.

Mr. Hartpence: Still it came up on cross examination.

Q. What has Michael been doing, Mr. Tonsellito, since he got out and could walk around after he was hurt?

A. The time he got hurt?

Q. What he has been doing since then?

A. Been around the house, that is all he been doing, only once in a while he gets run an automobile, but very little. He couldn't get steady job, because people scared to give him a job, because he limp too much on the cane.

Q. He has been around the garage pretty steady every day?

A. He has been around the garage himself half a day or quarter a day, like that. He get sick and try to stay in the house, and he goes there.

Q. What garage is that?

A. Garoni.

Q. Over at Seventh Street and Boulevard, West Hoboken?

A. Yes, Garoni.

Q. Who owns that garage.

(Objected to as not proper cross examination. Objection overruled.)

A. Schumann and Aroni. He ain't got no place to go and he goes there to spend the time.

Q. And he goes out with the machines as driver?

A. They won't give him the other machine.

Q. He goes out with the machine?

A. The people scared to give a job, because they could not go with one leg and he limp too much, and the people scared to give a job.

Q. Even then he goes out with the machine from the garage?

A. No; he can't go with the machine—he is far away—

116 about a block and a half, where I live.

The Court: He probably misunderstood.

Q. He goes out from this garage with machines, doesn't he?

A. Why, once in a while he go, but he could not go because people is scared to give a job.

Q. Have you ever seen him run an automobile yourself?

A. Why, I seen run an automobile, but the people scared to give a job on account of the limp too much with the cane.

Q. Have you ever been out with him yourself in an automobile?

A. No, sir.

Q. Where have you ever seen him running one?

A. Why, I seen him on Fifth Street when he goes by there. It ain't so often, though, because the people is scared to give a job, and that is all. I have to support himself ever since he got hurt.

Q. Has he brought in any money to you at all since he got hurt?

A. He couldn't make any money.

Q. Has he or has he not brought in any money since he got hurt?

A. Well, when did he make a dollar, why he bring to his mother.

Q. Can you say how much he has made and brought in?

A. Very seldom he make a dollar.

Q. How does he make that dollar which he makes very seldom?

A. Why, he make run automobile, but he couldn't get the job like that every day. He make that money, and he make maybe once a month and maybe two months he bring a dollar in the house.

Q. And the rest of the time you took care of him?

A. The rest of that time I took care of myself—have eat and have to support and clothe and all.

Q. How long have you worked around the Granton yard.

117 Mr. Tonsellito?

A. I have been working there ever since that track was built. I have been working steady in the storehouse.

Q. Over at the storehouse?

A. Yes.

Q. You knew this track, this storehouse track; you had often seen it there?

A. Why, I was go, sometimes three or four times a day, I was

going to the machine shop and bring material from the machine shop, and bring stuff, some material got to be repaired in the roundhouse, bring it to the machine shop and bring in the roundhouse.

Q. Up and down that track?

A. Up and down that track several times.

Q. Did you ever see any engines go up and down that track?

A. No; only the engine when he came to switch, unless he come on the storehouse track.

Q. You have seen engines on the storehouse track?

A. Yes, certainly, I have seen many times.

Q. Have seen cars taken up and down that track to the storehouse?

A. Yes, sir, I did.

Q. Every day there are some?

A. Yes, most every day,—every other day.

Q. Ever seen anybody get on or off an engine or a car there at that switch where Michael was hurt?

A. No, I don't seen nobody except brakemen.

Q. You have seen brakemen do that, haven't you?

A. Yes.

Q. You have seen him turn the switch there?

A. Yes.

Q. And get on and off the train or on and off the cars?

A. When he goes by the engine he got to turn the switch, same as I do when I go in the hand car down to the shop, I have to throw that switch myself, and everytime I pass up there I had to go very carefully when I go along the line there, I could have slipped myself and run down in the hole where it is two feet deep—see—
118 I had to be careful to go on the top of the ties. There is no ground there—it slant two feet deep.

Q. That is right where the air pipe goes?

A. Yes; I had to step on the top of the tie.

Q. Anybody else would have to do the same thing?

A. Yes.

CHARLES H. MCKEE, sworn.

Direct examination by Mr. Simpson:

Q. Were you the storehouse keeper of this storehouse on the 23rd of June, 1912?

A. Yes, sir.

Q. Did you help put this barrel of oil in the engine?

A. Yes, I did.

Q. Where was it going?

A. To Ravina.

Q. What kind of oil was it?

A. I don't remember any more.

Q. What?

A. I say I don't remember.

Q. What kind of oil did you have in the storehouse?

Mr. Hartpence: I object.

A. Olive oil.

Mr. Hartpence: I object to it as incompetent, irrelevant and immaterial.

Mr. Simpson: I want to show, if there is any question about interstate commerce, that if he was carrying a barrel of oil to use on engines he was engaged in interstate commerce—he was carrying it from the shops at Weehawken to Ravina—if the oil was for engines he was surely engaged in interstate commerce——

The Court: I supposed that was the purpose of your question.

Mr. Hartpence: There is nothing in the question to indicate it might be used on engines or what engines it might be used on,
119 but a mere barrel of oil to be used on engines would not necessarily put it in commerce, or the mere fact it was engine oil would not necesarily put it in commerce.

The Court: I will overrule the objection.

(Question repeated.)

A. Valve oil, car oil, signal oil, kerosene.
Q. Was it kerosene oil?
A. I say I don't remember.
Q. Was it valve oil?
A. I don't remember.
Q. But you kept the stores there for the West Shore Railroad?
A. Yes, sir.
Q. You had another storehouse at Ravina, didn't you?
A. Yes, sir.
Q. You were sending this barrel of oil from your storehouse at Weehawken to Ravina?
A. Yes, sir.
Q. How much did it weigh, do you know?
A. I think a barrel of oil usually runs about four hundred pounds.
Q. Four hundred pounds?
A. I think that is about right.
Q. You do not remember what kind this was?
A. No.
Q. You put it on the engine?
A. I helped to.
Q. Who helped you put it on?
A. I couldn't say any more who did.
Q. Did you have any order for it?
A. I believe I had a telegram for it.
Q. What did you do with the telegram? Who has that telegram now?
A. I could not say.
Q. What did you do with it? You have a regular system, haven't you, of filing away your papers?
A. Probably filed it on our order file.
Q. It would be up in Weehawken now, wouldn't it?
A. I don't know.

Q. What did you do with it after you got through with it?

A. I say I probably filed it in our order file.

Did you go away with the engine when Ohr was on it?

I did.

With the barrel of oil?

No, no.

Where did you go; did you stay at the store house or go away ne engine?

Court: Do you mean after the oil was put on?

After the oil was put on I don't remember where I went. I ly went back to the storehouse.

Cross-examination by Mr. Hartpence:

How long had you been employed there as storekeeper, Mr. e?

Up to that time—I went there from October, 1911, I think, up time, whatever that is.

After this barrel of oil was placed on the engine, did you see n?

Probably did; I don't remember.

Are you now employed there as storekeeper?

No, sir.

Are you employed by the New York Central at all, or the West ?

No, sir.

Redirect examination by Mr. Simpson:

Why do you say you probably did? Where would you see rrel of oil after you put it on the engine?

In case I walked out to the roundhouse or something, and the e was setting outside.

But after that day did you see the barrel of oil? Did you see n Ravina?

No, sir, I did not.

You did not go to Ravina?

No, sir.

Q. Was that the custom of the company, when they wanted stores in Ravina to ship them from Weehawken, or to ship them from Ravina to Weehawken?

jected to as irrelevant, incompetent and immaterial. Ques- ithdrawn.)

WILLIAM J. ARLITZ, sworn.

Direct examination by Mr. Simpson:

Doctor, you are a practicing physician and surgeon?

I am, sir.

Have been such how long?

A. About twenty-five years.

(The plaintiff, Michael Tonsellito goes to a seat alongside the w
ness and takes off his shoe.)

Q. Are you connected with any hospitals or institutions in th
country?

A. I am the visiting surgeon of St. Mary's Hospital.

Q. Any other hospitals you are connected with?

A. I am a consultant of the North Hudson Hospital, and was t
consulting surgeon of the City Hospital until this year.

Q. Have you devoted any of your time to surgery, that is,
operations?

A. I have been a visiting surgeon of St. Mary's Hospital for abo
twenty years.

Q. Have you performed amputations of limbs?

A. A great many of them.

Q. Have you examined the limb of this boy Tonsilleto, his l
leg, below the knee?

A. I did.

Q. What did you find its condition to be?

A. He has had an amputation of the greater part of the foot.
this time he has an inversion of the heel bone, and he h
122 also a refraction of the heel bone, which is because the prop
amount of tension to keep the foot in posture has been
away.

Q. In your opinion is it necessary to perform another operati
to get a good result?

A. That would give a good result.

Q. Will you show the jury on his foot what is necessary to
done before he gets a good result—what will have to be done?

A. At this point here he has a marked point of tenderness fro
the friction of his shoe, and because the lower end of the tibia p
jects forward. Because of this contraction of the tendon achil
it throws backwards and pulls it aside. The proper thing to
would be to do another amputation.

Q. Where would you do it, how high up?

A. I would take off about three inches of this stump.

Q. And then do you think you would get a good result?

A. I do, yes, sir.

Q. What would be the cost of that, to do an operation of that kin

A. All depends on the man who did the operation.

Q. Well, I mean for a competent surgeon who could render
good result, and who had had enough experience, what would
the usual charge for it?

A. I should say a hundred dollars would be an average fee.

By the Court: That would be a reasonable fee?

A. I should think so. Some men would charge a great deal mo
and some would charge less.

By Mr. Simpson:

Q. A reasonable fee would be about a hundred dollars?

A. I should call that a reasonable fee.

Q. That would take off how much—how much would that leave him of his leg below the knee?

A. That would leave him plenty for leverage. He could
123 wear a different type of artificial limb with considerable degree of comfort. This type is not a comfortable type.

Q. Of artificial limb?

A. It is not.

Q. In the condition in which he is now, as you see his foot, is it a natural thing he should have pain with this kind of foot and this kind of artificial——

A. That is borne out by the fact that he has an irritation of the front of the stump now.

Q. That would indicate he has pain there?

A. That is due to friction from this type of artificial leg, and there is some pain there.

Cross-examination by Mr. Hartpence:

Q. Have you examined the shoe he wears, Doctor, on that left foot?

A. Yes, I saw the shoe.

Q. Well, that is not an artificial limb at all, is it?

A. No; it is what is called an artificial limb. It is a foot and the leg attached above where the—the artificial leg attached above.

Q. And the shoe is simply filled in to take the place of what would otherwise be occupied by the foot?

A. Yes, by the heel.

Q. Isn't that right; and that little irritation that you referred to at the forward portion of the foot results from the friction of the shoe?

A. Of this shoe. This type of amputation is not performed nowadays and has not been in a number of years, because the artificial limb makers have found that they cannot get a good result; there is always more or less irritation.

Q. I move to strike that out as not responsive.

Mr. Simpson: I object. Let him put the question.

(Question repeated.)

The Court: I think the answer may be stricken out be-
124 cause it does not appear to me to be responsive in any part.

(Question repeated.)

A. Yes.

Q. And if he had a proper shoe that could be overcome, couldn't it?

A. Could not. He would always have trouble with this type of amputation.

Q. If he had a proper shoe that irritation would not result, would it?

A. Yes, it would. There is not sufficient amount of integument between the bone and the outer surface. You see, there is the skin—the skin is very thin over that particular point. He could not wear a shoe without some friction at this point. If he had that off and he would have a stump there would be a friction, but a different type of friction.

Q. But he could have a very much different type of shoe, could he not, than what he has?

A. Well, I suppose he could. I don't know enough about shoes to speak intelligently on that subject.

Q. Of course if he has to use an artificial limb, it would, in your opinion, as I understand it, be necessary to amputate about three inches more of the present stump?

A. Yes; above the articular surface of the ankle joint, that would be plenty.

Q. As Michael now is constituted he has the whole of the left limb, hasn't he?

A. Why, he has all of the leg and he has a part of the heel. All the forward part of the foot has been cut away.

Q. His leg remains intact, doesn't it?

A. I believe so.

Q. Well, you examined it, didn't you?

A. Yes.

Q. And can you say?

A. Yes; he has all of the leg.

Q. It is a cardinal rule of surgery, Doctor, isn't it, to retain as much as possible and save as much as possible of the tissue in performing an operation?

A. It is, but I would like to qualify that answer. In the
125 performance of a surgical operation the result is what we are striving at. We know from long experience that in this type of injury the proper thing to do is to remove the articular surface of the tibia and the fibula and do your amputation in that way. If you want the heel bone to remain or a part of it to remain the proper thing to do is to slit in two and bring the new surface of the oscalcis up against the new surface of the tibia and fibula and keep it in that posture, and then the end of that stump will be a good bony stump and would be quite useful; a man could bear his weight on it with considerable degree of comfort. That was the former type of operation, but we do not do that operation any more. We go above the joint and make usually a flap for the man's comfort. We find he can work better, he can get around better.

Q. Even though it sacrifices the complete or entire foot?

A. Yes sir.

Q. To that extent are you willing to state, are you, that the fundamental rule of preserving as much tissue as possible is to be qualified?

A. Is to be qualified, yes. Now if a man had a compound fracture of the finger, or if he had a compound fracture of the foot you would not do any cutting if you could avoid it, perhaps only to make a sufficient amount of drainage; you would wait until the right time and then cut accordingly. Now, if you had a very extensive experience in this type of injury you would say that the most useful result for this man is for me to take off the structures up above the ankle joint, especially if he is a working man.

Q. At the time of the injury?

A. Yes, after you have decided what would be the proper thing

o do. Now, I don't know, this man at his primary injury might simply have had a compound fracture of the foot.

126 Q. At the time of this injury this operation may have been entirely the proper thing to perform?

A. I don't know. There may not have been an operation. There may have been just a cutting up and dressing up at that time, at the time of the injury, and he may have refused additional operations.

Q. You were not present?

A. No sir, not at all. I am only speaking of my experience in this type of cases.

Q. Of course, there are exceptions to all the general rules, are there not?

A. I believe so.

Q. And even though a given type of case may follow a more or less fixed course you always find deviations, do you not, from that general type?

A. We do not find any deviations in this type of case. We have decided there is only one proper thing to do to promote the usefulness of that member, to bring about a good result, and that is to go above the ankle joint.

Q. That is to cut away the foot and leave him only part of the leg?

A. Yes.

Q. What do you mean when you say "We have decided? Who has decided?

A. That is the experience of men who have done a great deal of work in surgery; they have found that where the result of this kind follows there is always more or less trouble with artificial limbs.

Q. Well, as a matter of fact there is no occasion for an artificial limb with Michael, is there, in his present condition?

A. Well, there is occasion for support to give him the spring which a normal man has in the heel and toe, but he hasn't either with this type of instrument.

Q. And if Michael is *to* your opinion, as I understand it—if Michael is successfully using an artificial limb, it will be necessary to cut away a portion of his present natural limb in order to

127 give him that opportunity?

A. I say about three inches of a leg removed, his result would be at least twenty-five per cent, if not more, better than it is at the present time.

Q. And I suppose that if Michael wanted to enjoy the privilege of an artificial arm it would be necessary to cut away his arm?

A. It would be a different thing.

Q. Well, it would be necessary to do it?

A. Not at all, because you could attach a hook to an artificial arm or an artificial wrist. There it would be merely a question of leverage. In this particular case it would be a question of weight and the equilibrium of the body. The weight and equilibrium of the body are not borne by the arm.

Q. But still in Michael's present condition if he desired to have

the pleasure and privilege of using an artificial arm it would be necessary to cut away some portion of his present arm?

A. Use an artificial arm?

Q. Yes.

A. If he wanted to use an artificial arm he would have very little use of the arm. He has a normal arm.

Q. He would have to cut away some portion of his present natural one?

A. Unless you get a big hollow one and slip it over this one.

Q. That is about the same condition, is it, with regard to his left leg?

A. No.

Q. If he wants to use an artificial leg you have to cut away some portion of the present one?

A. The circumstances are different. A hollow limb or artificial limb would not be any benefit to him in his present case.

Q. Doctor, suppose three inches of Michael's present left leg were amputated, then he would be dependent entirely on his artificial apparatus, wouldn't he, to get around with that leg?

A. He would be dependent upon the support surrounding
128 the leg and the joints in the artificial ankle and the artificial foot.

Q. Could not get around without it?

A. Could not, but at the present time this joint is absolutely worthless to him; he would be better off without it.

Q. Well, still he walks with the shoe that he has and with the aid of a cane?

A. He does.

Q. And he runs an automobile with it, doesn't he?

A. May.

Q. And if you amputate that additional three inches of his leg he would be compelled to resort to the apparatus all the time, wouldn't he, or else he could not use that stump?

A. Why, he would have better use of it. Now in the first place he cannot run an automobile—any man knows that who drives—he cannot run an automobile with his heel. he cannot manipulate his clutch with his heel. He does that with his foot. At the present time he is doing that with an artificial foot, an improper artificial foot.

Q. And if he had an artificial leg—he would have an artificial leg?

A. He has one on now. An artificial leg he would have to wear after an amputation would not be any heavier.

Q. Well, he would have to operate that clutch with an artificial leg?

A. Just the same as he is doing now, only it would be operated better.

Q. In your opinion?

A. I know that from experience.

Q. In your experience from operating a car with an artificial leg?

A. No; from my experience in surgery. I have performed a great

many amputations—in the hundreds—of the lower extremities, and I have seen so much trouble folowing amputations of this kind. Twenty-five years ago we all had the same idea, save the astragalus and the oscalcis if you can, and then we decided we would remove the astragalus and cut off the lower end of the tibia and
129 fibula and cut the ascalcis in two, and we often found that the cases did not get along and that the union did not take place with the same degree of rapidity—there was many of them infected cases, and they would extend over a month or eight or nine months or a year, and we found out afterwards where we made an amputation at the lower third of the leg, with the proper flap, we got a good result; a man was out in three months' time with an artificial limb and he could do most anything.

Q. Do you know of any cases of that kind where they use that artificial limb in the operation of an automobile?

A. Why, I could not recall at the present time, that I know—yes, I will tell you one. I amputated Mr. Otto Schaeffer, who is manager of the Madison Garage in Hoboken. That is the last amputation. In that particular case we did a number of amputations—four—first of the toes and then of the foot: it was a progressive case and we had a bad result. We finally wound up by an amputation of the leg.

Q. There would be no reason why Michael could not operate an automobile, then, in your opinion, if the other three inches were removed and he was fitted up with a proper artificial apparatus?

A. Certainly he could.

Q. This other case that you refer to, Schaeffer, he operated it all right, did he?

A. Yes; his amputation is considerably higher than that. He has a license to drive, too.

Q. Issued by the State of New Jersey?

A. Surely.

Q. Drives an automobile?

A. Yes sir.

Plaintiff rests.

130 *Motion to Nonsuit.*

Mr. Hartpence: If the court please, we move for a nonsuit on the following grounds:

In the first place we feel that it has not been sufficiently established by the testimony of the plaintiff to warrant the court retaining jurisdiction of the case, the fact of the employment by the defendant of the plaintiff at the time of the injury complained of in interstate commerce. Under the Federal Employers' Liability Act, under which this suit is brought by Michael Tonsellito, it must appear affirmatively that both the plaintiff and the defendant were engaged in interstate commerce at the time of the injury complained of. If the right of action in the infant fails for that reason, then it would seem to us that the right of the parent to recover in this action would also fall, and for that reason first we move for nonsuit

in each case. In the second place the proof of the negligence of the defendant does not affirmatively appear sufficient to make it incumbent upon the defendant to proceed with its case. The testimony as it stands shows the presence of the boy Michael Tonsellito, upon the engine in question—stripped of all the other facts in the case which may not bear particularly upon that point—at the switch where the accident occurred. The only testimony as I analyzed it and as we contend it exists of negligence on the part of the defendant would be the testimony with regard to the roadbed at that point, and that testimony amounts to this: At the point where Michael attempted to board the engine—and whether it was moving or not I understand the counsel for the plaintiff to have stated was really of minor importance, and that the chief element in the case was the question of the condition of the roadbed—there was a hole alongside of the track. It affirmatively appears that this was a fill
131 in the yard, an incline leading up from one point in the yard to another point, where it became necessary to make a fill. It is hardly necessary for us to show what a fill is—we all know what it is—and we all know that in railroad construction cuts and fills are necessary where the ground requires such a cut or fill to make the roadbed level. At the point where this hole, as it has been called, existed, there was a compressed air pipe which at that point bulged out, a sort of circle or semi-circle, and supporting that compressed air pipe was a log of wood buried in the earth, and Michael testified that the hole was there and he saw it and knew it, and his father testified the hole was there and he saw it and knew it, and he said as he went up and down the track he would step over it to keep from sliding down off the track at that point; and Michael had worked in the place for a year and a half, been all around the yard, day after day, and he was thoroughly familiar with the situation. It was perfectly apparent to everybody, and it had a purpose, it had an object; it was there to help take care of the apparatus which was placed there. That is not necessarily defective construction. That is not necessarily a question of negligence in maintaining or operating a roadbed. It is a situation that is necessary and which is perfectly obvious to any one using it as a place which is unsuited absolutely to the very thing which Michael Tonsellito attempted to do. So it seems to me that it fails there both to establish negligence on the part of the defendant and also serves to establish the assumption of risk by Michael and the absolute lack of care on his part for his own saftey. Of course that last element is a matter which is properly for the jury on the weighing of the damages, but it does seem
132 to me under the statute this plaintiff must first sustain his burden of proof on the two questions of the defendant's negligence and on the question of the assumption of risk, and it seems to me that it is so obvious, the whole situation is so plain that plaintiff has failed to show either negligence on the part of the defendant or to show that Michael was free from the obligation which was cast upon him in the performance of his duty. For those reasons we think a nonsuit should be granted.

The Court: What have you to say upon the question of the as-

mption of risk where the plaintiff was a minor of the age of this aintiff?

Mr. Hartpence: Of course the general rule, if the court please, that a minor is entitled to certain—greater, perhaps—safeguards be thrown around him than a person who is sui juris and a person who has reached the age of discretion and who knows just what uties he must perform and what obligations he may be charged ith. But here was a boy of sixteen years of age, who for a year and half was allowed by his parent to be employed in this yard and ho had himself been employed in this yard and who was thorughly—must be taken to be thoroughly, entirely familiar with the rroundings, and surely he was of sufficient mental capacity and fficient understanding if in that year and a half he was able to eep out of trouble and take care of himself in the roundhouse, on nd off the engines, the ashpits, up and down the yard, and all those ositions of danger—certainly in that time he had acquired himself, f he had not been specifically instructed, with the intuition which ecomes the sixth sense of the railroad man of taking care of himself.

It seems to me that he must be thoroughly charged with the
133 knowledge of the danger of that position.

(Mr. Simpson replies.)

The Court: I will decline to nonsuit on the grounds stated.

Mr. Hartpence: The court will allow an objection.

The Court: You may have the objection entered.

Defendant's Testimony.

FRED HEMPHILL, sworn.

Direct examination by Mr. Hartpence:

Q. Where are you employed, Mr. Hemphill.

A. Department of State.

Q. At the State Capitol, in Trenton?

A. Yes, sir.

Q. Is the Department of Motor Vehicles a part of that Department of State?

A. It is.

Q. Have you produced from the Department of Motor Vehicles any records this afternoon relating to chauffeur's license issued to Michael Tonsellito?

A. I have.

Q. Will you produce what you have, Mr. Hemphill? These two cards that you now produce and which I now show you are what? Are they a part of the records of the Department of Motor Vehicles?

A. They are.

Q. And produced from the records of that Department?

A. They are. The first one is a driver's permit, or rather a license for the year 1913. It is license number 44371.

Q. To whom?

A. To Michael Tonsellito.

Q. What is the second one?

A. The second one is a driver's license, No. 22,489, to
134 Michael Tonsellito for the year 1914.

Mr. Hartpence: I offer them in evidence.

Mr. Simpson: I have no objection.

By the Court:

Q. Are they licenses that you have designated, or applications?

A. They are the permit for the license. He holds the license himself.

Mr. Simpson: Let me see that.

Mr. Hartpence: They will speak for themselves on that question. I suppose they contain the record of the issuing of the license, and Michael already testified to the fact.

Mr. Simpson: That is all.

(Papers marked Exhibits D-1 and D-2.)

Mr. Hartpence: They are original records, and if we may have the envelopes marked and then have them impounded in the court I think perhaps Mr. Hemphill would be willing to leave them.

The Court: They can be left with the stenographer, who can keep them, I suppose, right in the envelope.

Cross-examination by Mr. Simpson:

Q. You are simply from the office, aren't you Mr. Hemphill?

A. Yes.

Q. Do you hold any position there?

A. General clerk.

Q. You know nothing about the kind of an examination the man was put through who signed this license?

A. I do not.

Q. Do you know whether your office knew that he had one or two legs before they issued the license?

A. No, sir.

Q. Don't know anything about it?

A. No, sir.

Q. Is it the custom of your office to issue licenses to legless men?

135 Mr. Hartpence: I object:

A. I don't know.

The Court: He says he don't know.

FRED B. MULCOX, sworn.

Direct examination by Mr. Hartpence:

Q. Mr. Mulcox, what is you- occupation?

A. Court reporter—stenographer.

Q. I show you a paper consisting of eight pages, and ask you whose signature that is on the bottom of the eighth page?

A. My signature.
Q. Have you ever seen that paper before?
A. Yes, sir.
Q. What is, it, Mr. Mulcox?
A. It is a transcript of an interview had between Mr. O. M. uackenbush and Michael Tonsellito at the North Hudson Hospital, eehawken, July 31, 1912.
Q. Were you present at that time?
A. Yes, sir.
Q. Did you take down stenographically the conversations that en-ed between Mr. Quackenbush and Mr. Tonsellito?
A. Yes, sir.
Q. Did you take it correctly?
A. Yes.
Q. Is this transcript a correct transcript of that stenographic eport?
A. Yes, sir.

Mr. Hartpence: I offer it in evidence.

(Objected to on the ground that it is immaterial and irrelevant.)

Mr. Hartpence: I have the original stenographic notes here which can offer.

Mr. Simpson: If you have them here and if you show those are the otes and if this witness will say it is a correct transcript of the otes I will not make that objection.

Mr. Hartpence: He has already said that, except the fact that these are the notes.

36 The Court: I suppose Mr Simpson has a right to know.

Mr. Simpson: If he says it is a correct transcript I will ot object.

Q. I show you another paper and ask you if those are the stenog-aphic notes which you took of that transaction?
A. Yes, they are.
Q. This typewriten transcript which you have referred to, which I first showed you, is that a complete and correct transcript of the tenographic notes?
A. Yes, it is.

Mr. Hartpence: I will offer them both.

Mr. Simpson: I make an objection. I have not read this thing. If this contains anything excepting the matter relative to this ques-tion I want to object to it. I don't know. It may be a lot of stuff in these notes.

The Court: You are reserving to yourself the right to object to the relevancy of this. That you may reserve. Otherwise it may be marked.

(Papers marked Exhibits D-3 and D-4.)

Cross-examination by Mr. Simpson:

Q. Where was the occasion of this conversation? Where was it, in a hospital?

A. In the hospital.
Q. And the patient was lying in bed?
A. No; I think he was up at the time.
Q. And the claim agent was there and you were there?
A. Yes.
Q. And you were there to take down what the wounded man said?
A. Yes.
Q. For the claim agent?
A. Yes.

137 CHARLES H. SIMERSON, sworn.

Direct examination by Mr. Hartpence:

Q. Mr. Simerson, what is your occupation?
A. Dealer in automobiles—garage business generally.
Q. How long have you been in that business?
A. About ten years.
Q. In business for yourself?
A. I am. I am president of a company.
Q. Have you operated automobiles during that time?
A. I have.
Q. Have you hired men to operate them for you during that time?
A. I have.
Q. How extensively?
A. In what capacity, as mechanics, do you mean, or chauffeurs?
Q. To operate automobiles as chauffeurs?
A. Oh, I have probably hired seventy-five to a hundred men, different times.
Q. Are you familiar with the automobile trade?
A. I am.
Q. Are you familiar with the wages paid drivers and chauffeurs of automobiles in this community?
A. Generally speaking, yes.
Q. Where have you carried on the business that you have referred to during the past ten years?
A. The past eight years in West Hoboken and North Bergen, and also had a place at Communipaw Avenue and Hudson Boulevard for about two years.
Q. Do you hire out automobiles, with chauffeurs?
A. I have.
Q. Are you familiar with the prices and wages paid chauffeurs in this community?
A. I am.
Q. What is the average price paid to a chauffeur or a driver of an automobile?
A. Well, it depends a good deal upon the class of work that he is to perform, whether it is on a delivery wagon or a cheap car or a high priced car.

138 Q. What would be the average price upon a delivery wagon?
A. From fifteen to twenty dollars a week.

Q. On a moderate price pleasure car or touring car?
A. From fifteen or eighteen dollars to thirty-five and forty.
Q. And on a high priced car?
A. Well, I have taken that. That is about the limit. By and arge it will run from fifteen to twenty dollars.
Q. Have you ever had occasion during that period to employ nd use chauffeurs who suffer from defective limbs or feet or in- ured limbs or feet?
A. I have had two.
Q. Who were they?
A. Thomas Shea and Frederick Meaney.
Q. What was their condition?
A. This Thomas Shea had a slight amputation, how much I don't now. I never saw his shoe off; and Meaney had an affection of the ip that shortened his leg about four inches. He wore a shoe with big—his foot was more small—that is, appeared as if his foot as very small and the rest was a big piece of cork in the bottom.
Q. Which foot was that?
A. That was the right foot on Meaney.
Q. Which is the more important foot in the operation of the nechanism of the car?
A. Well, they are both important at different times. The right eg is called upon to perform the heaviest duty in the average utomobile; the left foot is used for releasing the clutch.
Q. Which foot is usually used to operate the brake?
A. The right foot.
Q. That is where the heavy pressure comes?
A. That is a steady pressure required there to check the auto- mobile. The clutch pressure is one that can be performed by a woman.
Q. In fact you can operate that with your hand, couldn't
139 you?
A. You could if you were in a position to reach it.
Q. Can you operate the brake with your hands?
A. Oh yes, you can operate the emergency brake, that in all cases is operated by the hand lever.
Q. Did these two men operate successfully for you?
A. This Meaney was one of the best drivers I ever had. Drove for me in races and is now driving for Herman Pruser, for the last three or four years, who is the treasurer of the Elks, driving a Pope-Hartford car.

Cross-examination by Mr. Simpson:

Q. You prefer deformed chauffeurs, I suppose. You want them with deformed legs?
A. I didn't say so.
Q. Do you?
A. No.
Q. Suppose a man had a wooden foot or wooden leg and he had his foot on the clutch and he got a severe pain in the end of his stump when he wanted to keep the clutch out, and take his foot off

and the clutch went in and the car went ahead, would anything happen to the car?

A. Will you please repeat that question.

(Question repeated.)

A. Not necessarily to the car, but it might to something that was in the way of the car.

Q. And you had two men working for you, one had a deformed hip and the other had something amputated on his foot—you never saw his foot?

A. No.

Q. How do you know there was any amputation on it then?

A. Simply he told us.

Q. What?

A. He said he had an amputation.

Q. Was it a big toe?

A. I don't know.

Q. Or the little toe?

A. I don't know.

Q. Or all his toes off?

A. I don't know.

Q. You don't know anything about it except that there
140 was some kind of an amputation?

A. He limped.

Q. You would prefer a chauffeur with a wooden leg, wouldn't you and you think they would be better than a man with a flesh and blood leg?

A. I did not say so.

Q. Have you any in your employ that have their leg off to three inches above the ankle?

A. No.

Q. Will you give this man work as a chauffeur if he had his leg cut off?

A. I might.

Q. How much would you pay him?

A. Depends on his ability.

Q. Will you give it to him to-night?

A. No; I do not need anybody.

Q. When would you need somebody?

A. I can't say.

Q. You would not give him work to-night?

A. I do not need anybody.

Q. But if you wanted somebody you would give him preference to some man with a good leg?

A. Not necessarily. If he had more experience than the other man.

Q. Would you give him preference to a man who had a wooden leg?

A. I say it depends on his ability.

Q. If a man came in for a job limping on a stick would you prefer him to a man who had a good leg?

A. No.

Q. Where is your business?
A. On Hudson Boulevard.
Q. Did you get a subpœna to come here to-day?
A. No; I was called up.
Q. Who called you up?
A. Mr. Hartpence.
Q. Mr. Hartpence? Does Mr. Hartpence keep his car in your place?

A. I did not know that Mr. Hartpence had any car.
Mr. Hartpence: I haven't any car.

141 Q. What is your connection with the case? Do you work for the New York Central or any of these railroads?
A. Never have in my life.
Q. And you came here without a subpœna?

Mr. Hartpence: I brought him here as an expert. You do not have to supœna an expert.

Q. Are you a friend of Dr. Poole?
A. I am acquainted with him.
Q. Does he keep his car in that place?
A. He does.
Q. Oh! I guess that is all.

CHARLES H. MCKEE, recalled.

By Mr. Hartpence:

Q. Did you see Michael Tonsellito the day he was injured?
A. I did.
Q. Where were you at the time he was injured?
A. I was on the pilot of the engine, on the left side, the fireman's side.
Q. And the pilot—by the pilot of the engine you mean what is commonly termed——
A. The cowcatcher.
Q. —the cowcatcher. Where did you get on the engine?
A. I cannot say positively any more, but I think it was in front of the office, there is a path to the ashpit, near the toolhouse.
Q. Did you throw the switch, the storehouse switch at which Michael was injured?
Mr. Simpson: I object. It is leading.
The Court: It is leading. I suppose it is objectionable on that ground.

142 Q. Did you throw any switch while you were riding on the pilot of the engine?
A. I don't remember now.
Q. Do you know who threw the switch at which Michael was injured?
A. Michael did.
Q. Michael threw it himself. When he threw that switch where were you?

A. Just on the pilot.
Q. Could you see him——
A. I could.
Q. —from where you were?
A. Yes.
Q. Uninterruptedly?
A. Yes.
Q. Do you recall how far away from the switch itself, how far from the switch lever, the switch itself——
A. You mean the lever?
Q. Yes, the switch lever, the forward part of the pilot of that engine was when Michael threw the lever?
A. I should imagine from two to five foot.
Q. You say you were on the left hand side of the pilot?
A. Yes.
Q. On which side of the engine was the switch, on the side you were on, or the opposite side?
A. On the opposite side.
Q. What became of Michael after he turned the switch?
A. He walked back to get on the engine.
Q. And disappeared from your view?
A. Yes.

Cross-examination by Mr. Simpson:

Q. You were not here at the last trial, were you?
A. No, sir.
Q. Where were you?

Mr. Hartpence: I object. It is irrelevant, immaterial and incompetent.

Mr. Simpson: All right, if you object I will not press it.

Q. Where did you get on the engine?
A. Why, at the time he went down, towards the machine shop to get up on the storehouse track.
Q. Were there any switches thrown before this third switch,
143 while you were on the engine?
A. Yes.
Q. Who threw them?
A. I think Michael threw one of them.
Q. You, the other one?
A. I don't know whether I did or he did.
Q. You kept on the engine pilot?
A. Yes.
Q. The engine kept on going toward the storehouse? When you got to this third switch was the engine stopped when Michael threw the switch?
A. The engine stopped.
Q. Came to a stop?
A. Yes.
Q. After he threw the switch he came back to the right side of it?
A. Yes.

Q. Then he disappeared; how long had he disappeared from your ew when the engine started up again?
A. Well, it was not very long, just——
Q. Was it a minute or so?
A. Possibly a minute, more or less.
Q. Then how far did the engine go before it stopped?
A. Didn't go very far, just a few feet.
Q. A couple of feet. It didn't get to the switch, did it?
A. Yes, I guess it did.
Q. It did?
A. I think it did.
Q. You say the pilot was two to five feet on this side of the switch. it went a couple of feet it would not have reached the switch?
A. I think it went past the switch.
Q. Did it go past the switch—the part you were on, did it go past e switch, when the engine came to a stop the second time? Was past the switch, the part you were on?
A. I think it was.
Q. How much?
A. I don't know.
Q. Did you hear any outcry or hollering after Michael passed ou?
A. No.
Q. You didn't hear that. What was the first you knew he had een run over?
A. The engine started up and came to a stop again.
44 Q. Started up and came to a stop?
A. Came to a stop. We sat there for a few minutes and I ouldn't account for it and I got off the pilot and walked around ie front of the engine and saw him sitting on the bank.
Q. Saw him sitting on it. When did you see him, when he threw is third switch, and came on the left hand side of the engine and assed you——
A. He passed on the right side.
Q. Came on the right hand side, passed the pilot, threw the switch, alked back again?
A. Yes.
Q. When he passed you to throw the switch was the engine still ationary?
A. Yes.

Adjourned to October 14, 1914.

Second Day, October 14, 1914.

JOHN JOHNSON, sworn.

Direct examination by Mr. Hartpence:

Q. Mr. Johnson, what is your business?
A. Supervisor of tracks.
Q. For what company?

A. New York Central Railroad Company.
Q. New York Central and Hudson River Railroad Company?
A. Yes, sir.
Q. How long have you been employed by the New York Central?
A. Since 1886.
Q. How long have you been supervisor of tracks?
A. Since 1889—before that assistant roadmaster.
Q. Before that what?
A. Before that I was Assistant Roadmaster.
Q. What district do you cover?
A. Between New York and Cedarcliff now.
145 Q. Where?
A. Between Jersey City and Cedarcliff.
Q. Where is Cedarcliff?
A. That is about two miles north of Ralston.
Q. Does that district comprise that part of the road which goes through Granton and the Granton yard?
A. Yes, sir.
Q. How long have you been there?
A. I was there on the 28th of last—of this month—or of last month.
Q. Last there? Do you mean you were there last?
A. Yes, sir.
Q. On the 28th of last month?
A. Yes.
Q. How long have you been covering that district?
A. Since that portion of the yard was built.
Q. When was that built?
A. It was built about five or six years ago; I don't remember.
Q. Are you familiar with the Granton yard?
A. Yes, sir.
Q. Are you familiar with that portion of the yard where the so-called storehouse track runs?
A. Yes, sir.
Q. Have anything to do with its construction?
A. I had charge of it—had general charge of it.
Q. How was it constructed?
A. Similar to all other yard tracks.
Q. Would you call it a good construction or otherwise?
A. Good——

Mr. Simpson: I object, because he does not show any foundation, and in the second place it does not mean anything. Good for what?
Mr. Hartpence: The question is withdrawn.

Q. In your experience as supervisor of tracks and other experience with the New York Central, you had occasion to build tracks?
A. Yes, sir.
Q. And roadbeds?
A. Yes, sir.
146 Q. For how long a period?
A. For the entire period.

Q. Where would you build tracks and roadbeds?
A. Different places.
Q. On the main line?
A. Main line.
Q. Any tracks in yards?
A. Yes.
Q. Spurs?
A. Yes, sir.
Q. Sidings?
A. Yes, sir.
Q. And this storehouse track, what kind of a track would you call at?
A. Just a standard track.
Q. Well, is it a main track?
A. No, sir.
Q. What sort of a track is it?
A. Siding.
Q. Is it constructed similarly to the usual siding tracks or roads of the New York Central?
A. Yes, sir.
Q. Can you state whether or not it has changed in any way or en changed in any way there at the point just south of the storeuse where a switch is located, and where Michael Tonsellito was jured on June 23rd, 1912—since that time?
A. There has not been any changes.
Q. Otherwise just the same as it was in June, 1912?
A. Yes, sir.

By the Court:

Q. Do you know this point where this bend in the compressed air pe is at that switch that has been spoken of at this trial?
A. Yes, sir.
Q. Do you know whether there has been any change whatever ade in the conditions at that point?
A. Not any.
Q. Since the time of the accident to Tonsellito?
A. No, no changes have been made.

By Mr. Hartpence:

Q. Could you tell, Mr. Johnson, whether there have been any changes made at the point where the switch itself is located, since the accident?
A. There has not been any changes made.
Q. Can you state whether or not there have been any changes at point from the switch itself to a point sixty or eighty feet south that swich?
A. No changes have been made.

Cross-examination by Mr. Simpson:

Q. You say that it is constructed like the other sidings of the New ork Central? What do you mean by siding? What is a siding?

A. A siding is for light engines and to use.

Q. Is a siding a track?

A. Off the main track.

Q. Is a siding a track where men are compelled to board engines and get off engines throwing switches and there is occasion for men to be off and on the ground and off and on the cars? Is that what a siding track is used for?

A. Yes, sir.

Q. Well, do you know of any other siding track of the New York Central that has the ground alongside of it two feet below the top of the rail?

The Court: The ties.

Q. The top of the ties?

A. Well that is not—that is not a condition at that point.

Q. That was not the question, sir. I asked you if you knew of any other siding of the New York Central that had the ground two feet below the top of the ties?

Mr. Hartpence: I object.

The Court: Does not that carry the inference that at some point or at this point it is this distance?

Mr. Simpson: Yes. One of my witnesses has sworn, and he has produced this man, that the roadbed is two feet below at this point. Now I am asking this witness not for the fact of how low it is, but if he knows any other siding of the New York Central that
148 has that condition, because he says "this siding is the same as all our sidings." Now if it be a fact that at a point on this siding the ground is two feet below the rail or the ties, then his answer will be relevant, which will show whether he is telling the truth that the other sidings are or are not in this condition. You see it becomes important evidently for the defendant to show that all these sidings are constructed this way. Now I want to find out if that is a fact, are they all constructed this way?

(Question repeated.)

Mr. Hartpence: My objection is as to the general form of the question. If Mr. Simpson will limit it to inquiring if there are points in the sidings which are two feet below just as the testimony shows this is, and give the point where it is two feet below, then I in some way that this witness is familiar with perhaps could not object to that.

Mr. Simpson: I do not think that is a good objection, because he has generally asked him not for any point.

The Court: I will overrule the objection. You may answer the question.

Mr. Hartpence: Enter an objection.

(Question repeated.)

A. Not up from the top of the tie down straight, but there is several places where there is a fill made where there is about that much.

Q. Is there any siding that you can name now or that you identify so that I can go and see it, where the ground is two feet below the tie, such as shown on this map which has been offered in evidence?

COPY BOUND CLO

Mr. Hartpence: I object unless it is shown in some way that this witness is familiar with the map and the reading of the map, and what the map means.

Q. Does that map mean anything to do?

A. It does not mean anything because it is not correct.

Q. Well, if it was correct would it mean anything to you?

A. It would if it was correct.

Q. Well, if it was correct what would it mean to you?

A. That would mean to me what it was at the place where it happened.

Q. Well, you can read this map, assuming that it is correct? You it is not correct?

A. No.

Q. Well, now, assuming for the purposes of my question, that it orrect, do you know any siding in the New York Central yard ich shows the condition shown on this map at a point anywhere hin fifteen feet or twenty feet of a switch?

A. Oh, I could not recall just the place where it would be in that , but there is several places where that ground is fully as low hat is, if not more.

Q. But you cannot point out to me now, can you, any siding near witch—any other siding near a switch where the——

A. We have one at Rockland Lake Branch.

Q. Where is that?

A. That is up in Countess.

Q. Any other that you can tell?

A. Yes, and there would be at Lowden's Pit.

Q. That is two. Any other?

A. And I don't know but you will find it at Granton, leading into roundhouse, that is the fill there.

Q. That is three. Anything else? Any other one?

A. Let's see, yes. There is one down here at Newark Avenue, at Sterling Junction.

Q. That is four. Any other that you can think of?

A. No, not just now.

Q. How many miles of siding has the New York Central that you familiar with?

A. Well, it has about a hundred or two hundred miles.

Q. All that you can tell of is four places in that hundred or two hundred miles.

A. Well, the signal track comes in in that same shape. Go in the iddle of a yard it is much different.

Q. You know all the sidings?

A. Yes.

Q. There is a hundred or two hundred miles?

A. Hold on now. I know all the sidings on my territory.

Q. How many is there on your territory, how many miles?

A. Well, there is some eleven hundred switches on it.

Q. How many miles?

A. Well, I haven't got that.

Q. Can you approximate it?

A. Well, somewheres near three hundred miles.

SE IN CENTER

Q. Three hundred miles and eleven hundred switches?
A. Yes.
Q. Now you have been up to look at this siding shown in thi picture, have you?
A. Yes.

Mr. Hartpence: Which picture is it?
Mr. Simpson: M. P-2, K. I think they are both marked th same.

The Court: No, one is marked P-1 and the other is P-2.
Mr. Simpson: Yes, your Honor is right there. That is P-2.

Q. Now, directing your attention to the picture at the poin marked in lead pencil, are you familiar with the conditions *he* shown here, of the ground being below the fill?
A. Yes, sir.
Q. Did you construct that?
A. I did not put that pipe in.
Q. No; did you make the siding?
A. The foreman did that had charge of it.
Q. Well, would there have been any reason why the fill could n have been continued out here three or four feet, so that the
151 would not be the drop of two feet until you got about thr feet away from the side?
A. That fill was left there for that pipe.
Q. I do not mean at the pipe, but I mean here at the side of t pipe; could there have been a filling made at two feet?
A. There could be a filling made.
Q. So there would be a path alongside of the tie instead of t drop about two feet; that could have been done, couldn't it?
A. It could have been done.
Q. It would have cost a little more money, wouldn't it?
A. Not much.
Q. When was this siding built?
A. Well, according to my recollection it was around about fi years ago.
Q. What do you mean when you qualify it by your recollectio Do you mean that is——
A. I haven't got the dates.
Q. You haven't got any records with you?
A. Yes—not with me—I have in the office.
Q. But not with you. When you say this siding is the same construction as the other sidings you mean in a general way it is t same, don't you?
A. Yes, sir.

Redirect examination by Mr. Hartpence:

Q. If any of these other sidings that you have referred to, M Johnson, should require the same condition as is required h where the air pipe curves out, you would be apt to find a place m

n the roadbed, to accommodate that pipe, just as it is there, wouldn't
ou?
A. Similar, yes, sir.

Recross-examination by Mr. Simpson:

Q. But can you show anything where this lead pencil is marked which requires the hole of two feet to accommodate this
152 curve, which seems to be at the left of the hole?
A. No.

JAMES REGAN, sworn.

Direct Examination by Mr. Hartpence:

Q. What is your business Mr. Regan.
A. Section foreman.
Q. For whom?
A. New York Central and Hudson River Railroad.
Q. Where are you stationed in the performance of your duties?
A. Now? At this time?
Q. Yes.
A. Weehawken—Weehawken yard.
Q. How long have you been employed by the New York Central?
A. Twenty-three years last April.
Q. What have been your duties in that time?
A. Repairing track, and doing general work.
Q. Ever build any track?
A. Yes, sir.
Q. Roadbed?
A. Yes, sir.
Q. Repair roadbed?
A. Yes, sir.
Q. Track?
A. Yes, sir.
Q. Well, during how much of the period have you done that sort of work?
A. I have done it, now for this last eight years.
Q. During that time did your duties take you anywhere in the vicinity of the Granton yard?
A. Yes, sir.
Q. At what time did your duty take you there?
A. Well, I done the work up there at at the time they built the new roundhouse up there; that is about five years ago, that that has been built.
Q. Are you familiar with the track that has been called the storehouse track in that yard where Michael Tonsillito was injured?
A. Yes, sir.
153 Q. Did you have anything to do with its construction?
A. I helped. There was another foreman there besides me and there was other gangs working there all the time.

Q. How long did it take to build it?
A. I couldn't tell you exactly that. I think it took about, pretty near a year to build that yard and roundhouse.
Q. Have you built or helped build or helped repair the main track of the New York Central at any time in your experience?
A. The main track?
Q. Yes.
A. Why, yes, last year I was out on the main line.
Q. And the roadbed of the main line also?
A. Yes, sir.
Q. And sidings?
A. Yes, sir.
Q. Yard tracks?
A. Certainly.
Q. Spurs?
A. All kinds of tracks had to be repaired and I done the work.
Q. This track which is called the storehouse track of the Grantor yard, what sort of a track would you call that?
A. Well, that is—that storehouse track is a turnout switch from the powerhouse to where we take the coal out from the boiler room.
Q. Is it the main line track?
A. No, only a side track—it is side track really. It is separate from all other tracks and by itself.
Q. Can you state when you last saw this storehouse track?
A. I was there last month.
Q. Were you there in June, 1912?
A. Well, I was in charge of the yard; I was not up there that day I would not say I was there that day.
Q. What day are you referring to as that day?
A. 1912. I was certainly in the New Durham yard; I could not state that I was up there at that point, not that day; I could not say.
Q. You mean the day of the accident?
154 A. I don't know whether it was the day of the accident or what day you are speaking of in June, 1912, and I can state.
Q. I asked you if you were at any time in June, 1912, there?
A. I was in the yard, but I could not say I was on that track personally; I could not say that.
Q. But you were stationed generally in that vicinity at that time?
A. New Durham.
Q. And how long had you been stationed there before June, 1912?
A. Five years.
Q. Can you state whether or not the condition of the storehouse track in the vicinity of the switch which is south of the storehouse is the same when you last saw it as it was in June, 1912?
A. Yes, sir.
Q. You are familiar, are you, with the air pipe that runs along the track?

A. Yes, sir.
Q. And do you know where the air pipe curves out just south of ıe switch?
A. Yes, sir; about seventeen feet south of the switch point—ɔuth of the switch.
Q. At that point particularly where the air pipe curves, has here been any change?
A. No, sir.
Q. And at the point where the switch is located itself, has there ɔeen any change?
A. No, sir.
Q. And on that section of track, from, say five or ten feet north ɔf the switch to sixty or seventy feet south of the switch, has there ɔeen any change?
A. No change.
Q. Can you state whether or not the ground at that point in the yard is perfectly level?
A. What do you mean; I can't get you.
Q. Is the general——
A. The ground level?
Q. The yard itself perfectly level?
A. No, sir.
Q. Where the storehouse tracks run?
A. No.
Q. Is the storehouse track built right on the surface of
155 ground or is it built above?
A. No; it is a grade.
Q. What do you call that in railroad——
A. A grade; and that starts down, I should say, about one hundred and fifty or two hundred feet further down, and it comes up a natural grade until it gets to about the boiler room.
Q. How did you bring that up that natural grade?
A. Put your ties on and then lay the rails on and some cinders on and raise it up and put the crown on.
Q. So the storehouse track is built on a fill?
A. A little fill, not a very large one, but further up it is a bigger one. It has a natural grade going to the boilerhouse.
Q. Is this fill where these tracks are located constructed similarly to other yard siding fills?
A. No, sir.
Q. Of the New York Central?
A. No, sir.
Q. In what way does it differ?
A. Because whenever you have tracks in a yard parallel to a main track you always have your crown and fill in between the tracks. This is a separate track, all alone by itself, running up to a certain point. When you make a track like that you have to make a grade on it to keep the water from laying on your tracks.
Q. In that respect it is built similarly to all single tracks and sidings?
A. It is built similar to all side tracks parallel to the main line.

Cross-examination by Mr. Simpson:

Q. You mean it is built generally the same as all other single sidings?

A. Yes.

Q. In every particular?

A. I said similarly.

Q. You do not mean identical?

A. Variations in all of them.

Q. We want to find out whether you mean whether it is
156 an identical replica of all other single tracks or simply as a general proposition it is built the same?

A. It is in a general way built as a single track by itself.

Q. As you explained to the jury, you put cinders and ties on them?

A. No, no; I do not say that.

Q. You lay your ties down on the natural ground, then after you got your rails put on and spiked, you go to work there and dump cinders on it and carry it up; you make a natural grade to any point you want to get to. The proper way—suppose it goes up to this boilerhouse to put coal in—you start way down here to make your grade and when you come up, you are going up all the time until you get it so you can go into that boilerhouse.

Q. What raises it up?

A. Cinders and jacks.

Q. You jack it up as you put the cinders in?

A. You drop it in and put your jacks in, so you are making a natural grade.

Q. When you get enough cinders you stop and take your jacks out?

A. Take your jacks up and tamp it and grade it.

Q. You couldn't, if you wanted to, in filling that track, have made the fill wider than you did?

A. What do you mean by that, you could have?

Q. Why, instead of showing——

A. At this point?

Q. I do not mean at the pipe. I mean between the pipe and the switch, when you have passed this curve?

A. Between the pipe and the switch there might have been a little bit more throwed in there, but I could not really tell you whether there was more throwed in at the time we built this track; there was repairs done after we built that track five years ago, and this pipe was put in by other men. What they done I don't know.

157 Q. In building the track you might have built it with a wider fill, and it might have been——

A. This is on a natural grade right here.

Q. That shows what you did?

A. That is natural grade, I know that.

Q. The assumption would be that you carried this up further and the man who put in the pipe altered it?

A. You see they put a stake there.
Q. And they might have taken out instead of leaving it as it is—
ey might have taken out there?
A. Might have. I don't know about it.
Q. You don't know anything about that?
A. No, sir; not that part.
Q. All right. That's all.

GEORGE TERWILLIGER, sworn.

Direct examination by Mr. Hartpence:

Q. What is your business, Mr. Terwilliger?
A. Track foreman.
Q. By whom are you employed?
A. New York Central.
Q. New York Central and Hudson River Railroad Company?
A. I have a cold and cannot speak very loud.
Q. How long have you been employed by that company?
A. Since June 4, 1912.
Q. As a track foreman where have you been located in the per-
rmance of your duties?
A. Granton.
Q. At Granton?
A. Granton; yes, sir.
Q. In the yard at Granton?
A. Well, part of the time the yard, and part of the time the main
ack. I have two miles of double tracks besides at the yard.
Q. What are your duties as track foreman?
58 A. Why, general repairs, put in new ties, raise tracks,
line tracks, repair switches, any general repairs that is needed.
Q. Have you built roadbeds?
A. Yes.
Q. Have you built tracks on the roadbeds?
A. Yes.
Q. And repaired those?
A. Yes, sir.
Q. How long have you been doing that sort of work?
A. Last thirty years.
Q. Did you have anything to do with the construction of the
acks in the Granton yard which lead up to the storehouse?
A. No sir; they were all built when I took charge of them.
Q. You know where the storehouse track is?
A. Yes, sir.
Q. Are you familiar with that?
A. Yes, sir.
Q. How long have you been familiar with it?
A. Since the 5th of June, 1912, I went all over the entire job
hat I had.
Q. At that time?
A. Yes, sir; the 5th of June, 1912.

Q. Can you state whether or not there have been any changes in that storehouse track since that time you have just stated——

A. No, sir.

Q. —down to the present time, especially with regard to that portion of the switch just south of the storehouse down to where the air pipe curves around?

A. No, sir.

Q. How about from the air pipe on farther south thirty or forty feet?

A. No, sir; no repairs been made.

Q. Have there been any changes in the condition there right where that air pipe curves around in that time?

A. No sir.

Q. They remain just the same as they were at that time in June when you were over it?

A. Oh, I walked over quite often—take a walk over the section—we are supposed to every week, according to the book of rules.

159 Q. Can you state when you were last at that point of the switch and air pipe?

A. I was past there on the 8th of this month, the last time.

Q. What sort of track is that storehouse track, main line track?

A. No, sir.

Q. What would you call it?

A. I would call it a siding.

Q. What kind of siding?

A. Where they run cars up to the powerhouse and into the supply house. There is not a great deal of switching done there.

Q. Would you call it a yard siding?

A. A yard siding—regular yard siding.

Q. Was it built right flat on the surface of the ground?

A. No; there is a raise of a couple of feet there.

Q. What is that for the purpose of?

A. To get a grade to go up into the powerhouse and into the supply house.

Q. How is that grade filled in?

A. Why, with cinders.

Q. Is that or is that not similar to the construction at that point of other siding-, yard sidings of the New York Central and Hudson River Railroad?

A. Yes, sir; you see sometimes we have wider shoulders than we do others, on account of our material—we ran a little short—at points where we raise our tracks higher.

Q. Does the height of the fill have something to do with the construction of it with the width of the fill?

A. Certainly does; yes, sir.

Cross-examination by Mr. Simpson:

Q. What is the shoulder? What do you mean by the shoulder?

A. The shoulder where it slopes off from the ties.

Q. The other side of the ties, or the outside of the end of the ties?

A. Yes.

0 Q. Sometimes you have wider shoulders than others because sometimes you run short of material?

A. Yes, sir.

Q. You have not the dirt to make a wide shoulder?

A. Sometimes we raise the track higher than what the amount material is dragged out by the engine. The cars are dumped and ey drag it right out, a certain amount right along.

Q. So the width of the shoulder sometime depends on the material u have at hand?

A. Yes.

Q. If you have the material you make a wider shoulder?

A. Yes.

Q. You say this siding is the some construction as the other. ou mean the whole siding, the general construction?

A. General construction, yes.

Q. You do not mean at any particular point—that every point in ery other siding, do you? That may be a confusing question. will withdraw the question. You do not mean by that that is lentical in every point in every other siding, do you?

A. Oh, no.

Q. You simply mean the general means of construction? When id you go there, the 4th of June?

A. I took charge of the Granton yard the 4th of June, 1912, yes.

Q. Well, does this picture correctly show the condition?

A. This is where the steam pipe is?

Q. Yes; and that is the switch.

Mr. Hartpence: What is that picture?

Mr. Simpson: I am referring to P-2.

Q. Does that show generally the condition?

A. That is very good.

Q. Here the ground seems to be even with the ties, because half f the tie is sunk?

A. It is wider here than it is there.

Q. Wider here than the shoulder?

A. It looks wider here than it is here, certainly.

61 Q. The shoulder?

A. Yes, sir.

Q. Pointing to a point between the switch and the roundhouse—he roundhouse is down this way, isn't it?

A. Yes, sir.

Q. Between that water pipe rather, and the roundhouse? On his picture between the curve of the water pipe and the switch imbers the ground seems to be lower at the side and the ties are xposed?

A. Yes.

Q. Is that a fact?

A. It is a little exposed; yes.

Q. Well, they are over two feet exposed, aren't they?

A. Why, that tie ain't exposed two feet. These ties are only supposed to be six by eight inches.

Q. You are right about that. I mean the drop of two feet the to the ground.
A. It might be, yes. I did not measure it.
Q. Was that the condition when you took hold of it?
A. Just the same, yes.
Q. You were not there when the pipe was put in?
A. No, sir.
Q. You don't know if anybody dug the ground away or the ma who built it left it in this condition?
A. Just the same as when I took charge in 1912.
Q. You never filled the ground in there?
A. No, sir.
Q. Never did anything there?
A. No, sir. No repairs on this piece of track since——
Q. Never tried to make a wider shoulder?
A. No, sir.

Mr. Hartpence: If the court please, if my opponent will conse to the use of the exhibit which was prepared by the engineer a used upon the former trial without the necessity of prelimina proof, I think I can, perhaps, save time.

Mr. Simpson: I certainly will if you say it is the same m
162 that was used the last time.

Mr. Hartpence: It is exactly the same map and contai the same marks as the last time.

Mr. Simpson: Perfectly willing to have you use it.

Mr. Hartpence: I will offer it in evidence and ask that it marked as an exhibit.

(Map marked Exhibit D-5, and placed on easel.)

EUGENE P. KRAEMER, sworn.

Direct examination by Mr. Hartpence:

Q. Mr. Kraemer, where are you employed?
A. Why, at Weehawken, New Jersey.
Q. By whom?
A. New York Central and Hudson River Railroad.
Q. In what department?
A. In the Division Engineer's department.
Q. What is your business there?
A. Why, transit man.
Q. Are you an engineer?
A. Yes, sir.

Mr. Simpson: I will admit his qualifications.

Q. Did you make this blue plan that is placed here and mar Exhibit P-2? Did you make that?
A. I made the tracing and made the blue print.
Q. What is it, a tracing or a blue print?
A. Why, it is a map showing a portion of the New Durham ya
Q. Is that also sometimes called the Granton yard?
A. Yes, sir.
Q. What portion of it does it show?

COPY BOUND

A. Why, it shows the track leading up to the boilerhouse,
163 and it shows a part of the boilerhouse and part of the storehouses and oil tanks.
Q. Does the track also lead up to the storehouse?
A. Yes, sir.
Q. Where is the storehouse? Will you indicate it on the map?
A. Right over here—there is two houses, connected by a platform.
Q. Beyond the eastern corner—where is the boilerhouse?
A. The boilerhouse is here.
Q. Just——
A. Just northeast of it.
Q. Now does the plan indicate or show a switch in a southerly direction from the storehouse?
A. Why, yes, sir.
Q. Will you show where that switch is?

(Witness indicates.)

Q. Indicating I-J?
A. Yes, sir.
Q. You also have some other letters indicated just south of the switch; what do they indicate?
A. I have some letters indicating positions here I took some cross sections.
Q. Cross sections? Does your plan show the distance below the switch that those cross sections were taken?
A. It shows the distance in every case except one, and that is the section I-J. That distance is not marked.
Q. That distance is not marked?
A. No, sir.
Q. How far south of I-J is the cross section G-H? Is the plan drawn to a scale?
A. The plan is drawn to a scale of twenty feet to the inch.
Q. Now will you tell, please, what the distance south of the switch I-J, cross section G-H is?
A. It is forty-five feet.
Q. What is the distance of the cross section E-F?
A. Ten feet.
Q. Ten feet what?
A. Ten feet south of E-H.
Q. Give the distance south of I-J?
A. That would be fifty-five feet.
164 Q. What is the distance of the cross section C-D south of I-J?
A. That is sixty-five feet south of I-J.
Q. What is that part indicated X? What is that?
A. Part indicated X shows a switch heading towards the south.
Q. How far south of I-J is the cross section A-B?
A. It is about one hundred and ten feet.
Q. Now what do your cross sections show?

LOSE IN CENTER

A. Why, the cross sections show the rails resting on ties, and sho a crown away from the ties, in other words, shows the sub-grade.

Q. Does it show the physical condition of the track and of th roadbed and of the ties there at the switch, and for about one hun dred and ten feet south of the switch marked I-J, where you hav taken your cross sections?

A. Yes, sir.

Q. Now take your cross section marked two, XX's, is that th cross section G-H?—that, if you remember, was erased so that w could keep the X's straight. Your cross section two XX's, wh does that indicate?

A. Why, the cross section two XX's—I have the ties and rail and I have the distance from the top of rail to the ground four fe out from the rail is thirteen and one-half feet on the east side.

Q. Thirteen and a half feet?

A. Thirteen and a half inches on the east side and sixteen an one-half inches on the west side.

The Court: Pardon me; where is the cross section XX show upon your first diagram there? Which cross section is it?

A. G-H.

Mr. Simpson: Is that between the water pipe and the switch or the other side of the water pipe?

Mr. Hartpence: South. There is the bulge of the wat pipe.

165 Mr. Simpson: It is all south of the air pipe?

Mr. Hartpence: Yes, sir.

By Mr. Hartpence:

Q. What do you mean a point four feet out from the rail?

Mr. Simpson: I object to the question on the ground that it irrelevant what the cross section shows south of the water pipe, cause we are only alleging what the cross section shows between water pipe and the switch, so it is entirely irrelevant and it is imm terial. My objection is that it is not relevant, because all we concerned with is the cross section here and not the cross sections here (indicating).

Mr. Hartpence: We are concerned with this, if the Court ple and of course I cannot bring my witnesses all at once to show but the defendant's testimony will show that the point of injury much further south than the point——

Mr. Simpson: I did not remember that.

Mr. Hartpence: —then the point indicated by the plaintiff's nesses.

The Court: That is sufficient to make relevant this testimony.

Mr. Simpson: Yes.

Mr. Hartpence: And further reason is that we want to show different conditions existing around there as compared with——

Mr. Simpson: My recollection was that all the evidence was the accident happened between the switch and the water pipes.

Q. At a point four feet out from the rail. What do you mean by that?

A. Why, measured distance four feet horizontally from
166 the gauge of the rail.

Q. Out on the shoulder of the fill?

A. Out on the shoulder of the fill?

Q. At that point four feet out from the rail you say what is thirteen and a half inches on the east side?

A. I say that the ground is thirteen and a half inches lower than the top of the rail.

Q. At that point?

A. Yes, sir.

Q. And on the west side at the cross section G-H it is how low?

A. Sixteen and one-half inches.

By the Court:

Q. And the east side, is that the side which the bend in the air pipe is and the switch lever is, that I-J?

A. Yes, sir.

By Mr. Simpson:

Q. You say the east side is the side of the air pipe?

A. Yes, sir.

By Mr. Hartpence:

Q. The cross section E-F, marked three X's, will you state what that shows?

A. Why, that shows that at a distance of four feet from the gauge of rail on the east side is thirteen inches below the top of rail.

Q. And on the west side?

A. On the west side it is fourteen inches.

Q. Take your cross section C-D, marked four X's, state what that shows in that respect?

A. The same distance, four feet out, the ground, is four and one-half inches lower than the top of rail.

Q. On the west side what is it?

A. It is nineteen inches.

Q. Take your cross section A-B and state what that shows
167 in that respect?

A. That shows at a distance of four feet out the ground is eighteen inches lower than the top of the rail on the east side, and eighteen and one-half inches on the west side.

Q. Now take your cross section I-J, marked six X's, what does that show?

A. Section I-J shows the rails, ties and the ground.

Q. Where?

A. The ground——

Q. Where does that show the rail, and the tie, and the ground at which point on your general plan?

A. At the point of switch I-J.

By the Court:

Q. What do you mean by point of switch; is that where the switch lever is, by which they move the switch?
A. Yes, sir.

By Mr. Hartpence:

Q. How far out does the tie run on that point, on the east side, from the rail itself?
A. I have about seven feet five inches.
Q. How many rails or planks are there there?
A. There are two long ties.
Q. Have you the width of those ties on the flat surface, or haven't you?
A. I think I have.
Q. Did you make notes of these measurements at the time you made the measurements?
A. Yes, sir.
Q. Have you preserved those notes?
A. Yes.
Q. Have you those with you?
A. Yes.
Q. Are they correct? Do they show your measurements correctly?
A. The notes show the measurements, yes, as they were taken at the time they were taken.
Q. Do your notes show the measurements that you took at the switch I-J?
A. Yes.

Q. Will you refer to your notes, please, and state what
168 the width of the flat surface of those two ties is at that point I-J?

A. Why, one of those, the southerly tie, is about ten inches wide and the northerly side is eleven inches wide, and the two ties are spaced two feet, center to center of ties.
Q. Will you mark that on your plan, please, just the number southerly tie—just put the amount—number of inches? That is enough.

(Witness marks "Southerly tie, 10 inches, northerly tie 11 inches.")

Q. What is the space between the two ties?
A. About a foot between them.
Q. Can you figure them?
A. It is two feet less about eleven inches.
Q. And that would be?
A. A foot and one inch.
Q. Indicate that, please?

(Witness writes on map "1 foot 1 inch between.")

Q. The switch lever and the switch light rest right on these planks do they not?
A. I think the switch stands supported between the two ties.

Q. Now, Mr. Kraemer, do your notes show the measurement of ıe contour of the roadbed at the point of the switch I-J?
A. The plan does not show those measurements.
Q. Do your notes show it?
A. I think I can give those measurements from my notes.
Q. Well, if you can state what the measurements are at the point our feet out from the rail at the east and west sides just as you did n your other cross section; mark them on there, if you will, as you lo it. Just mark on there the number of inches, whatever it happens o be (witness complies).

Q. At a point four feet out from the rail on the east side, 169 what is the distance from the level of the top of the rail down to the roadbed itself?

Mr. Simpson: Where is that? Where?
A. At I-J.
Q. At the switch indicated I-J?
A. A distance of thirteen and one-quarter inches.
Q. On the west side, what is that distance at the same point, four feet out from the rail?
A. That distance is fourteen and one-half inches.
Q. Will you indicate that please, on the other side of the cross section? (Witness complies.)

Cross-examination by Mr. Simpson:

Q. Now you have not any cross sections on this map showing your P-2, between this curve of the water pipe and the switch, have you?
A. We have not.
Q. You haven't?
A. No, sir.
Q. Did you take any measurements of the cross section between the first two ties north of the curve of the water pipe? Did you take this cross section?
A. No, sir; I did not.
Q. You did not take that?
A. No, sir.
Q. Did you take the cross section between the second and third ties north of the curve of the water pipe and south of the switch?
A. No, sir.
Q. Did you take any cross section between the curve of the water pipe and the switch?
A. I did not.
Q. Did not. So that you cannot tell us how far below the tie the road here is?
A. No, sir.
Q. Don't know anything about that?
A. Why, I know there is a little depression.
Q. Well, exact—I am asking you as an engineer—measurements? Did you take any measurements? No little stuff. Did you take any measurements?
A. No, sir.

Q. And all your maps represent then is the distance—the
170 cross sections behind the curve in the water pipe—that is north or south, or how is it?

A. Yes, south.
Q. You have nothing?
A. I just have one section north.
Q. And that is at the switch itself?
A. The switch.
Q. But nothing between the switch and the waterpipe?
A. No, sir.

That's all.

Redirect examination by Mr. Hartpence:

Q. When did you make that map, Mr. Kraemer?
A. The map was made somewheres around April 3, 1914.
Q. Just prior to the former trial of this case, was it not?
A. Yes.
Q. And you testified in the former case and used that map at that time, did you not, *did you not?*
A. Yes.
Q. You have not made any measurements since that time?
A. No, sir.
Q. You made these measurements at that time in accordance with my direction, did you not, as to where these cross sections should be placed?
A. Yes.

That's all.

Recross-examination by Mr. Simpson:

Q. You testified at the former trial? You did?
A. Yes, sir.
Q. And you made a map at Mr. Hartpence's direction, then?
A. Yes, sir.
Q. This is the map that you made?
A. Yes.
Q. You are still in the employ of the New York Central?
A. Yes, sir.

Q. Now, Mr. Hartpence has not given you any measure-
171 ments since the last trial to make any measurements between the curved water pipe and the switch?

Mr. Hartpence: I object to it as incompetent, and immaterial because on the last trial there was not a scintilla of testimony on the part of the plaintiff or on the part of any other person in the case as to any occurrence north of the curve of the water pipe, all the testimony went to the south, and it was not until this case which now comes on that that fact was brought out. For that reason the question is incompetent.

Mr. Simpson: That is not the fact at all. The accident at the last trial was located at the same point it is now, and whether it was

not, Mr. Hartpence is asking this man, "You made this map ıder my direction?" And I want to find out what those direc-ɔns were, because if it is evidential for him to prove that he gave rections it certainly is evidental——

The Court: I will overrule the objection.

Q. Mr. Hartpence did not give you any directions at any time up ntil to-day to make any cross sections between this curve of the ater pipe and the switch, did he?

Mr. Hartpence: I object on the ground that there is nothing ı the evidence to show I gave him any directions to-day to make a ross section.

Mr. Simpson: Well, I will withdraw that.

Q. When you say that you made the map under the direction of Ir. Hartpence do you mean that he told you what he wanted you ɔ make?

A. Why no, not directly. I made my survey first. Made up my plans and showed Mr. Hartpence what I had done.

72 Q. Was that before you made the cross section?

A. It was afterwards.

Q. And you showed him what cross section you had made?

A. I showed him what cross sections had been made.

Q. And told him where they were, did you?

A. I told him where they were and asked him whether there were ny more details to be obtained in the field.

Q. What did he say?

A. And at the time it was stated that there were not.

Q. He did not tell you then to make any cross sections between his curved air pipe and thes witch, did he?

A. No, sir.

That's all.

Mr. Hartpence: Now, if the Court please, on the former trial the estimony of Arthur M. King, George W. Wasley and George W. Ball, engineers, produced from the Pennsylvania Railroad and the D., L. & W. and Lehigh Valley, was given, and I should like, without the production of these men, to read the testimony that was taken at the former trial, and I understood that I was granted that privilege at the time that the terms of this trial were agreed upon.

The Court: That is part of the stipulation.

Mr. Simpson: I have no objection to it.

The Court: My recollection is that that was part of the stipulation and part of the terms upon which that trial was postponed to this time.

Mr. Hartpence: I thought it would save time for the court and jury and also for these men, who are very busy men.

173 "ARTHUR W. KING, sworn.

Direct examination by Mr. Hartpence:

Q. Mr. King, what is your occupation?

A. Division Engineer, Lehigh Valley; have held that position for four years; have had fifteen years' previous experience as an engineer; my experience has made me familiar with the construction of the roadbed, rails and ties of the Lehigh Valley Railroad, and I have installed lots of tracks, ballast, etc., of all descriptions. As division engineer I have full charge with respect to tracks and men under me, as to maintenance of tracks and construction of tracks.

Q. Do you have any standard plan of construction?

A. We do.

Q. What is the standard plan?

A. Well, it varies, whether it is minor branch or main track.

Q. What is the main track plan?

A. Main track consists of roadbed, ties and stone ballast, and our minor branches are usually gravel or cinder ballast.

Q. What do you mean by minor branches?

A. That is a branch leading off into some, what we call dead end tracks; they go off into where there may be a little nest of tracks by themselves, one of those tracks would be a minor branch, and several tracks branching off.

Q. Are you able to state what the dimensions are from your standard plan for the major branch?

A. Well, I have copies of them. I cannot recall that right offhand.

Q. What do those copies show?

A. It shows elevation—shows section of the tracks, single and double track and four track.

Q. Do they show accurately the standard plan of the Lehigh Valley?

A. Yes.

174 Q. Who made them, do you know?

A. Made in the Engineer of Maintenance of Way Office.

Q. Have you ever consulted them?

A. Yes; we always consult them.

Q. Use them in the construction of your tracks?

A. We do.

Q. By referring to that memorandum would that refresh your memory as to the dimension of the standard plan?

A. Yes.

Q. Will you refer to it, please, and state what the dimensions are of the main or major branch of tracks?

A. Main track branch?

Q. My question related to main track. I have the main track —. ——.

Q. Have you the branch or the minor branch?

A. Yes.

Q. State what the dimensions of the minor branch are?

A. Our distance from the top of the ties to the top of the groun at 9 feet 6 from the center of the track is 19 inches.

Q. What distance would that be on the outside of the rail?
A. That would be 2 feet 4¼ off of that.
Q. What is the height of the rail above the tie?
A. That varies on the section of rail that you use. You use all ne way from 58 pound to 110 pound. Usually our yard tracks re—our minor branches are made of 80 and 90 pound rail.
Q. What is the distance?
A. About 5 inches would be a good fair average rail.
Q. Can you recall the standard plan for the major branch?
A. Main track?
Q. Yes; your main track?
A. Yes.
Q. At a distance of about 2½ or 3 or 4 feet outside of the rail?
A. The distance at 4 feet 1¾ inches from the outer rail to the sub-grade, that is the bottom of the ballast—19 inches.

175 Cross-examination by Mr. Simpson:

Q. What is it to the top? What is the measurement to the top? You say that is the bottom.
A. The top of our ballast at the end of the tie is about an inch below the top of the tie.
Q. Inch below?
A. Yes.
Q. Well, now, when you measure 4 feet out from the top of the rail how much lower is the ground, that is, the surface of the ground, than the top of the rail?
A. 4 feet out.
Q. Well, suppose you take the top measurement and run it out 4 feet out from the top of the rail, how low would the end of the top measure out on the top of the ground—how much lower than the rail?
A. 19 inches plus the height of the rail.
Q. Plus the height of the rail?
A. Yes.
Q. In switching in yards—as I understand you are familiar with tracks in the yards and in the main track and all the construction work, aren't you?
A. Yes.
Q. If the ground at the side of the track is so low that a brakeman or any person standing on the ground can with difficulty reach the step of the car, isn't that poor building?

(Objected to. Question withdrawn.)

Q. Isn't there some consideration given in the building of these tracks in the standard plan to the working man getting on and off cars and on and off engines?
A. The plans are drawn with that in view.
Q. So that it will be safe for them to get on and off engines and cars? They wouldn't have too great a distance from the ground to the step?

A. No, sir; plans are drawn so the bottom of the ballast or slope is not far enough to interfere with anybody getting on or off the train."

176 "GEORGE W. WASLEY, sworn.

Direct examination by Mr. Hartpence:

Q. What is your occupation?

A. Office engineer of the Lackawanna Railroad; been such for nine years; had twenty-two years of other engineering experience altogether.

(Qualifications admitted by Mr. Simpson.)

Q. Are you familiar with the construction of the tracks and roadbeds of the Delaware, Lackawanna and Western Railroad?

A. I am.

Q. Both as to the main line and side branches and commercial sidings and yard sidings?

A. I am.

Q. Is there any fixed or standard plan of construction of the tracks and roadbeds?

A. There is.

Q. Can you tell me what that standard is in the yard sidings and also on the main line?

A. The yard siding, for single track, the width of the roadbed at sub-grade is 16 feet from shoulder to shoulder. The ballast—of course we use a 5-inch rail—all distance- are made from the base of that rail, and you will add on the rail, giving you top of rail, center of track, we have got 10 inches ballast, generally cinder, and the 5 inches of rail makes 15 inches; that gives you 7 inch tie and 3 inches cinders under that tie. I was going to say that the cinders sloped off from the top of the tie or a little below the tie—an inch is supposed to be—it sort of slopes off to the edge or to the shoulder, the edge of the embankment.

Q. The shoulder is where the embankment cuts down more sharply?

A. Yes.

Q. Can you tell me what distance from that portion of the shoulder 3 or 4 feet outside of the rail—what distance from that por-

177 tion of the shoulder to the top of the rail itself is in that standard plan?

A. 17 inches; in other words, a foot below the top of the tie.

Q. What is the same distance on your main track standard plan between the shoulder and top of tie?

A. Between shoulder and top of tie?

Q. Yes. That is, at a point 3 or 4 feet out from the rail?

A. Now, there we have—take about 5½ inch rail and the center of the track 17¼ inches is below the top of tie, and there is 2 inches in the center of the track, and your shoulder, as you say, about 3 or 5 feet out would be 3 inches lower, that would make 26 inches altogether below the top of rail.

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Cross-examination by Mr. Simpson:

Q. What provision do they make in that standard construction in the yard for the safety of brakeman getting on and off these moving trains?

A. Nothing more or less than we have the ci-der ballast and it gradually slopes off.

Q. There is not——

A. There is not an abrupt slope, it is only a strip 12 inches to the shoulder and it is an inch or so lower than the top of the tie, so it is really about—it slopes off 10 inches there, which makes in time a pretty nice path for trainmen.

Q. Right along side of the tie?

A. Yes, along the shoulder, I mean.

Q. Is that where the end of the tie or shoulder begins?

A. No; the shoulder is the edge of the embankment. Theoretically that is the line where the embankment drops down.

Q. Drops sheer off—where the embankment drops sheer is it?

A. Where is drops off on a slope of 1½ to 1—1½ horizontal to vertical.

Q. And this slope of 12 inches then is a gradual slope?

A. That is a gradual slope, yes.

178 Q. Now, where is the point where the distance is 23 inches lower than the rail? Is that 4 feet from the rail, 5 feet from the rail, or how far from the rail? I understood you to say——

A. Now is that main line?

Q. Yes, the main line or any line?

A. 17½ inches below the top of the tie and 5½ inches—23 inches, that is the center of the track.

Q. That is going in, into the track?

A. That slopes off to 26 inches.

Q. From the center of the track is 26 inches or from the rail?

A. It is 23 inches below the top of your rail.

Q. What do you mean by center? The center track is the center point between the two rails?

A. Correct.

Q. And at that point it is how far below the top of the rail?

A. 23 inches.

Q. Then you go again outside the rail, say — feet outside the rail, is it again 23 inches below?

A. 26 inches that is on account of drainage.

Q. Drainage?

A. Yes, sir.

Q. Then that track, of course, is properly ballasted between ties with broken stone, I suppose?

A. Yes.

Q. And cinders?

A. Yes.

By Mr. Hartpence:

Q. Can you tell the customary angle of your slope in degrees? You have used a technical term?

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A. Well, I could figure it, or their engineer could figure it. It is 1½ to 1; that means 1½ horizontal to 1 vertical.

Q. You cannot state off-hand what that would be in degrees?

A. I ought to know, but I don't; no, I couldn't.

179 "GEORGE M. BALL, sworn.

Direct examination by Mr. Hartpence:

(Qualifications as an engineer of the Pennsylvania Railroad admitted by Mr. Simpson.)

Q. What is your position with the Pennsylvania Railroad?

A. I am supervisor of track at Jersey City.

Q. Are you familiar with the construction of the track and roadbed of the Pennsylvania Railroad on the main line and on its side branches and commercial sidings?

A. Yes.

Q. Is there a fixed or standard plan for the construction of them?

A. Yes; we have a fixed and standard plan for track.

Q. Will you state what that fixed and standard plan is for yard or commercial siding and for the main track?

A. For the main track our dimensions are rather different from the other railroads.

Q. Speak a little louder.

A. Our dimensions are a little bit greater than the other railroads; we use a greater depth of ballast under the track, and that results in the edge of the ballast being further from the rail—5 feet 3 inches instead of 4 feet on some of the other roads; and at that point our sub-grade is 2 feet 3¾ inches below the top of the tie. We always work to the top of the ties.

Q. How much of a difference would the top of the rail make that?

A. Well, depend on the weight of rail you used.

Q. About how much?

A. Usual yard rail would be 5 inches.

Q. Will you state the same dimensions with regard to a yard switch or commercial siding?

A. No; I haven't got those.

180 Q. Have you any memorandum which will show that?

A. I have not.

Q. Have you a plan which will show it?

A. We have a standard plan, yes, adopted by the engineers of maintenance of way and approved by the general manager.

Q. Is this the plan or a copy of it?

A. Yes; that is an authorized copy of the Pennsylvania Railroad standard cross section.

Q. Can you answer my last previous question after referring to that plan, with regard to yard sidings or commercial sidings?

A. Yes; our standard plan shows the sub-grade carried out past the ballast border, that is carried out on a slope of ¼ of an inch per foot indefinitely by any number of additional yard tracks which you may build.

Q. From the top of the rail to the sub-grade at a distance of 3 or feet outside of the rail what would be the height?
A. Well, that was the height I spoke of.
Q. In inches?
A. 27 inches.
Q. That is on the main line?
A. Yes, out here. Then that grade runs out.
Q. On a commercial or industrial track?
A. On a siding—we do not go over that as carefully—that is ily 17-inch depth of cinder——
Q. That is what I am asking you. A point 3 or 4 feet outside the ail on your subsurface or base of your rail. What is the distance om the top of the rail?
A. That is 17 inches down from the top of the tie 4 feet out on the ack.
Q. How much above the tie would be the rail?
A. The rail would be as I said, probably 5 inches.

Cross-examination by Mr. Simpson:

Q. How far is it from the bottom of your rail down to say four eet away—how much of a drop is it to the bottom of the rail?
A. 17 inches.
81 Q. Is that a gradual drop?
A. Yes.
Q. How much is that a foot—an inch and a quarter a foot?
A. No; that is the slope of the sub-grade down below, below the allast.
Q. On top is the drop for the 4 feet; how much does it drop?
A. It goes out to the end of the tie, which is 1 foot 11 inches, and ou have 2 foot 1 inch which drops 17 inches.
Q. Your measurement is in the center of the track?
A. No—this is the way I said (indicating plan).
Q. Is that the rail there?
A. That is the rail.
Q. Then what is this space between the rail where she begins to go lown?
A. That shows tie; this cross-hatching here is the ballast.
Q. What is the distance from the rail to the tie there, the end of he tie?
A. 1 foot 11 inches."

KATE L. TULLY, sworn.

Direct examination by Mr. Hartpence:

Q. Miss Tully, what is your profession?
A. Trained nurse.
Q. How long have you been a trained nurse?
A. Twenty-three years.
Q. Where were you located in June, 1912?
A. I was superintendent of the North Hudson Hospital.
Q. The North Hudson Hospital is located where?

A. In Weehawken, New Jersey.
Q. Do you know Michael Tonsellito?
A. Yes, I know Michael.
Q. Do you remember Michael being brought to the hospital while you were there in June, 1912, injured?
A. Yes, I do.
Q. Can you state where you first saw him?
182 A. I first saw him in the emergency room on Sunday afternoon.
Q. Were you there when he was brought in?
A. I was.
Q. Did you examine him at that time?
A. Yes.
Q. What did you discover was the trouble with him?
A. That his foot was injured.
Q. Know which foot it was?
A. No, I could not say. Let's see; I think it was his right foot. I don't know, I could not say for sure, but I think it was his right.
Q. In what way was it injured?
A. The first three toes were partly off, but further up the foot was—the skin was not broken, but it was destroyed; it was just cut across this fashion—not straight across, but across in this fashion.
Q. Did you talk to him at that time?
A. Yes.
Q. What was his condition, rational or otherwise?
A. Oh, yes; Michael was rational. Told how he got hurt.
Q. What became of him after that?
A. He was first fixed up and he was taken to the operating room to be operated on.
Q. Were you present at the operation?
A. Well, I went in two or three times, but it was not my duty to stay there all the time. I went in while he was being operated on.
Q. Did you see him after the operation was performed at any time?
A. Oh, yes, I helped put him to bed after he came from the operating room.
Q. How long do you remember he remained in the hospital?
A. Well, I could not say, but I think somewhere about five weeks but I could not tell definitely.
Q. Did you see him from time to time while he was there?
A. Oh yes, I saw him several times every day.
Q. Now I show you a paper consisting of two sheets and
183 ask you if you have ever seen that before?
A. Yes, I saw those.
Q. Does your signature appear on those sheets?

(Objected to as irrelevant and incompetent whether the signatur of this witness appears. Question withdrawn).

Q. I show you a signature on the first sheet "Kate L. V. Tully Superintendent;" did you write that, Miss Tully?
A. Yes, that is my handwriting.

Q. I show you on the second sheet, "Kate L. V. Tully." Did you rite that?
A. Yes, that is my writing.
Q. Did you write the paper?
A. No, I did not.
Q. Who did?
A. Mr. Quackenbush wrote it.
Q. Did you read it in the hospital at any time?
A. Yes, sir, I read it before I signed it—read it out loud.
Q. Did you read it out loud?
A. Yes.
Q. At the time you read it who was present, do you recall?
A. Mr. Quackenbush and I—well, I don't know the man's name, but he is a tall man and I could not tell what his name is, but he is a man with a lot of light hair—I couldn't tell his name, but he came with Mr. Quackenbush.
Q. Where were you when you read it?
A. At Michael's bedside in the ward.
Q. Michael was there, was he?
A. Yes.
Q. Did you read that paper to Michael?
A. Mr. Quackenbush asked me to go back into the ward and witness the papers, and I did, and I read it out loud, and I started from top to bottom, and said, "Is that right, Michael?" and he said, "Yes," after I read it and read it out loud, and I signed it.
Q. When you read it and read it out loud you read it in Michael's presence?
184 A. In Michael's presence, so Michael could see what I signed and what was in the paper.
Q. He admitted to you, did he, that it was all right as you read it?

Mr. Simpson: I object to it as leading, and second it calls for a conclusion on the part of the witness. The conversation should be given and not her construction of it.

The Court: That is correct. I will sustain the objection.

Mr. Hartpence: I offer the papers in evidence.

Mr. Simpson: I object to it as incompetent, irrelevant and immaterial. It is not signed by the plaintiff. It is simply something that she read to the plaintiff, therefore it is simply a conversation by this witness with the plaintiff, and it would be evidence only to refresh her memory. The paper i-self is not evidence. It is not signed by this man.

Mr. Hartpence: It was read to him in his presence and admitted——

Mr. Simpson: I just want a formal objection.

The Court: What is the purpose of the offer?

Mr. Hartpence: The purpose of the offer is to show an admission on the part of the plaintiff, Michael Tonsellito as to the manner in which the accident happened, and for that purpose, of course, only.

The Court: All right. I will admit it.

Mr. Simpson: Objection.

The Court: *Objection.*

(Paper marked Exhibit D-3.)

Cross-examination by Mr. Simpson:

Q. What time did Tonsellito go under the ether?

185 A. Well, he came into the hospital very soon after one o'clock, I should fancy it was somewhere about two.

Q. He was put under the ether?

A. Yes, when he went in the etherizing room.

Q. Did you go in the room with him?

A. Yes.

Q. Were you there when the operation was performed?

A. It was not my duty to stay in there all the time, but I went in there several times.

Q. Who performed the operation?

A. Dr. Fendrick.

Q. Was Dr. Poole there?

A. No, I don't think he was.

Q. What time did Dr. Poole come there?

A. He came there after supper.

Q. After supper?

A. Yes.

Q. Is that the first time he came after Tonsellito was admitte to the hospital?

A. Uh, huh, I think it was.

Q. That is your recollection?

A. Yes.

Q. You are quite clear that Tonsellito was put under ether n later than two o'clock?

A. No, sir, he was not.

Q. I do not understand that answer.

A. No, sir, he was not put on after two o'clock because he w taken directly after he was washed off.

Q. Your judgment is about two o'clock?

A. Yes, two or very shortly after two.

Q. What time did he come out of the ether?

A. I should judge it must be somewhere about half past three four, because I remember the screens were up during visiting hou

Q. That is only your recollection of it?

A. I remember it.

Q. You testified at the last trial, didn't you?

A. I think so, yes.

Q. Do you remember what you testified as to what time he ca out of the ether at the last trial?

186 Mr. Hartpence: I object to it as not proper cross-examin tion.

Mr. Simpson: Well, he has asked this witness as to whether was in the operating room or whether he was under ether. He opened the door.

The Court: He is not objecting to that. He is objecting to y method of examination, as to her testimony at the previous trial.

Q. Didn't you say at the previous trial that he did not come ou the ether until five o'clock?

Mr. Hartpence: I object on the ground that it is not proper.
Mr. Simpson: I am simply calling——
The Court: No; I suppose the objection is that the witness is entitled to have her attention drawn to the record.
Mr. Simpson: That is not the objection he makes. Well, if your Honor will be indulgent until I find the testimony——
The Court: I will have to.
Mr. Hartpence: If I might ask this witness another question while Mr. Simpson is looking it up.
Mr. Simpson: No, you might not. I will object to your examining on anything at all while I am cross-examining. That is with deference to your Honor. I object. I do not mind any ruling on the question. I am objecting to his doing any such thing.
Mr. Hartpence: I will withdraw my request and try to restrain my impatience.

Q. Page 219; do you remember being asked: "What time did he come out of the ether," and your answer, "5 P. M." at the last trial?
187 A. Well, he could come out of the ether and be fully out of ether——

Mr. Hartpence: I object on the ground that it is not proper cross examination. On my direct examination I did not examine Miss Tully at all on the question of etherization of Michael or how long he was under the influence of ether or anything upon that point. I merely ask- Miss Tully if she was present at the operation, and she said——
The Court: It all goes to the question of recollection of this witness—testing her recollection. I will overrule the objection.

Q. Did you so testify at the last trial?
A. Ahem! He might be out of ether at half past three and be fully out of ether at five o'clock.

Mr. Simpson: I ask to have that stricken out as not responsive. I want to have the witness instructed to answer my question.
The Court: It may be stricken out. Read the question.

Q. Did you testify at the last trial that Tonsellito came out of the ether at five o'clock.

Mr. Hartpence: I object, on the ground that it is not properly stated.

Q. I will read the question. Were you asked this question: "What time did he come out of the ether?" And did you answer: "5 P. M."?
A. I don't know. I had the notes to refresh my mind right there at the last trial.
Q. Do you remember what you testified at the last trial?
A. No, I do not.
Q. Yet you remember perfectly what happened?

Mr. Hartpence: I object. It was long before the last trial.

188 A. My signature is right on that.
Q. Is that the only thing that refreshes your memory?
Q. I read it out loud. I read it this morning.
Q. When did you read it this morning?
A. Just now, when the gentlemen held it up for me.
Q. You mean you read these two pages while he asked you if that is your signature?
A. I can tell you things in that paper now that I read.
Q. Do you mean to say in the presence of the jury you read these two pages?
A. No; I read part of them.
Q. When did you read this piece of it?
A. I read a great deal of this.
Q. Had your hands on it?
A. No; I told you I never seen it at the hospital.
Q. What is your answer to that question? Did you testify at the last trial in answer to the question: "What time did he come out of the ether," did you answer, "5 P. M."?
A. He might have been fully out of the ether at 5 P. M.
Q. Did you testify to that?
A. I don't know.
Q. You don't know what you testified to?
A. Yes, I——
Q. What do you mean, you don't know what you testified? You testify so recklessly you don't know what you testify?
A. I do not testify recklessly.
Q. What do you mean by saying you don't know?
A. I had the notes to refresh my memory here the last time and I read the notes before I testified the last trial.
Q. You had notes?
A. Yes, the bedside notes.
Q. Haven't you the notes now?
A. No, I have not.
Q. You tried to get them?
A. No.
Q. Who was this Mr. Quackenbush?
A. He was the claim agent for the New York Central Railroad Company.
189 Q. Was it your custom in the North Hudson Hospital to allow claim agents the run of the hospital?
A. They did not have the run of it.
Q. You had him in there in the absence of this boy's father didn't you, talking about this case?
A. The boy was really conscious.
Q. The boy's father was not there, was he?
A. Why was it necessary?

The Court: That is not the question.

Q. I am not asking that now?

The Court: Was he there?

A. No, he was not.

Q. And this boy was alone with the claim agent and you and who else?

A. He was not alone with me. I was not present.

Q. You came in—the claim agent called you?

A. Yes.

Q. You say the claim agent asked you to witness?

A. Yes.

Q. Witness what? Witness Tonsellito's signature, wasn't it?

A. Ahem! Mr. Quackenbush read the paper to Michael. He handed it to me and I read the paper to Michael and stopped from time to time and asked Michael, "Is that the way, Michael?" "Is that correct, Michael?" and Michael said, "Yes." When I finished I signed the paper.

Q. What did you mean by "witness"? Didn't you ask Michael to sign the paper?

A. It was necessary to be witnessed, rather.

Q. You were there when Quackenbush asked him to sign the paper and he would not do it, weren't you?

A. Michael was instructed by his father not to sign the paper.

Q. Weren't you here? I asked to have the last answer struck out.

The Court: It may be.

190 Q. You need not argue this case for the New York Central. Mr. Hartpence will do that. Weren't you there at the time this paper was presented and did not this boy refuse to sign this paper?

A. Not in my presence.

Q. You knew he was asked by Quackenbush to sign it, didn't you?

A. Why, no; I didn't know whether Mr. Quackenbush asked him to sign it.

Q. You know what a witness on your part is? You know it is to witness a signature? You know when anybody signs as a witness they witness the signature of somebody else?

Mr. Hartpence: I object to it as calling for a conclusion.

Mr. Simpson: I will withdraw the question.

Q. What do you mean by witness; when you use the word witness what do you mean?

A. Mr. Quackenbush asked me to sign the paper as a witness that Michael's statement was correct and as he gave it.

Q. Didn't you ask Michael?

A. No.

Q. You know that Quackenbush asked him and he would not sign, don't you?

A. I do not.

Q. What did you mean by stating a minute ago that Michael's father would not allow him to sign any papers if you did not know that he refused to sign any paper?

A. Mr. Quackenbush told me.

Q. He told you that he would not sign a paper?
A. Yes, sir.
Q. Then you do know he would not sign the paper if Quackenbush told you?
A. He did not tell that in my presence.
Q. You testified a moment ago under oath, that you did not know this boy had refused to sign a paper. Now you say that Quackenbush told you he refused to sign a paper.
A. I said Michael did not say it in my presence.
191 Q. I asked you if you knew Mr. Quackenbush had asked him to sign that paper and you testified no, you did not know, didn't you, a minute ago, that you did not know whether Quackenbush had asked?
A. He didn't ask him in my presence.
Q. Didn't you testify a minute ago that you did not know whether he asked him or not?
A. I may have, but I meant he did not ask in my presence.
Q. Quackenbush did tell you that he would not sign the paper?
A. He did later on.
Q. You did know that Mr. Quackenbush had asked him to sign a paper?
A. Not in his presence.
Q. You did not say anything about not in your presence?
A. That is what I meant.
Q. You frequently testify for this New York Central Company in accident cases where people were hurt by them and admitted to your hospital?
A. Only on one other case.
Q. Only on one other case?
A. Let me recall. Let me see—only on one other case. I have never testified.
Q. That was in reference to a paper, too, wasn't it?
A. Yes, I think that it was.
Q. And that you tried to prove that a man knew what he was doing when he signed a release, didn't you?

Mr. Hartpence: Objected to as not proper.
Mr. Simpson: I will withdraw it.

Q. Where are you now, Madam; are you in the North Hudson Hospital?
A. No, I am not.
Q. Where are you now?
A. I am at 333 Park Avenue, Union Hill.
Q. Are you in business?
A. No.
Q. You are not occupied?
A. No.
Q. Are you still following the profession of trained nurse?
A. I am.
192 Q. Do you do any work for the New York Central Railroad?
A. No.

Q. As a trained nurse?
A. No.
Q. Don't you take care of any of their people that are injured?
A. No.
Q. Now were you in the room all the time that Mr. Quackenbush as there with this boy?
A. No. When Mr. Quackenbush came into the hospital I took im into the ward where Michael was.
Q. You left him there with the boy?
A. I left him there with the boy.

Redirect examination by Mr. Hartpence:

Q. Miss Tully—if I may be permitted to ask her a question hich I omitted to ask her—at the time you signed these papers, as it upon the date which is indicated in those papers?
A. I could not say. I could not remember.
Q. Do you recall the date from memory?
A. No.
Q. Not the exact date?
A. No, I could not recall it at all.
Q. The previous case or the other case that you have referred to n which you have testified for the New York Central, was a case n which the injured person was admitted to the North Hudson Hospital; isn't that true?
A. Oh yes, it was proved they came in the hospital, yes.

Recross-examination by Mr. Simpson:

Q. One thing I omitted. You say the ether was administered at wo o'clock?
A. No; I said a little after two. It must be a little after two.
Q. Did you testify at the last trial, being asked the question by the court: "When was the ether administered; does your rec-
193 ord it show when the ether was administered?
A. Was taken to the operating room—does not show the exact minute—says he came in at 1.20, and he came from the emergency room at 1.20, and he was bathed and undressed by Dr. Fendrick and taken to the operating room and operated on by Dr. Fendrick." Did you so testify at the last trial?
A. That could not have been correct.
Q. Did you so testify?
A. No, I did not.

Mr. Hartpence: I object.

A. I did not testify to anything——

Mr. Hartpence: It shows on the face that Miss Tully was testifying after having refreshed her memory, and I do not think it is proper cross examination at this time to ask her whether she so testified without the records before her which could be used for that very same purpose.

Mr. Simpson: I know of no such rule.

Mr. Hartpence: I submit it is a fair statement if the witne had testified from a record.

The Court: I think it is.

Mr. Simpson: She does not need it.

The Court: I will overrule the objection.

Q. Were you asked this question: What do you mean, Miss Tully when you say that "Michael came out of the ether at 5 P. M."?

Mr. Hartpence: I object on the ground it is not proper cross ex amination of what I asked this witness on direct.

Mr. Simpson: It is not recross examination. I simply asked you Honor's indulgence.

The Court: I will permit it.

194 Q. Were you asked this question: "What do you mea when you say that Michael came out of the ether at 5 P. M and did you answer: "Well, I mean to say Michael was conscious- probably would say, "Oh, I have got so much pain in my leg." "Th is what I mean by saying he was out of the ether—perfectly conscious He would say at once, "I want some water." Did you so testify?

A. Yes, I did.

Q. Then were you asked this question: "Q. If he went to mak any statement that would be an indication of his coming out o the ether?

A. Yes, sir."

A. Yes, sir.

Q. Were you asked this question at the same time by me "Doe that mean completely recovered from the effects of the ether or h just cried and was conscious?

A. Just coming out."

A. I didn't pay attention to the first of it.

Q. "Does that mean completely recovered from the effects of th ether, or he just cried and was conscious, and did you answer, Ju coming out." Did you so testify?

A. Yes, sir.

Q. Well, what do you say now as to the fact, was he just comin out of ether on this occasion at five o'clock or was he coming ou as you testified a minute ago at half past three?

A. It takes an hour and a half to come out of ether.

Q. Madam, I do not care if it takes a year: I am asking you wh you meant. Do you mean to say as a fact now, as you have alread said, that he came out at half past three, or as a fact that he cam out or was just coming out at five?

A. He might have been just coming out at five, too.

Q. At five?

A. Yes, sir.

Q. When you say he might have been you mean that is your be recollection?

A. Well, there is a lot more to be said to the question.

195 Q. You mean you would like to say a lot more?

A. No; there is a lot.

Mr. Hartpence: I will call Mr. Alex Simpson.

ALEXANDER SIMPSON affirms.

Direct examination by Mr. Hartpence:

Q. Mr. Simpson, you are the attorney for the plaintiffs in the ases, are you not?
A. That is a matter of record, sir.
Q. And you conducted the previous trial of the suit of Michael Tonsellito against the New York Central and Hudson River Railroad, lid you not?
A. I did, sir.
Q. And on that trial you [illegible]ed Miss Tully, the previous witness, as your witness?
A. I did, sir.
Q. And you also subpœnaed her to bring with her her bedside notes and records in the case of Michael Tonsellito?
A. I did, sir.

Q. That's all.

Cross-examination by Mr. Simpson (of himself):

Q. And you have on this trial subpœnaed the superintendent of the hospital to bring those records, because Miss Tully is not in possession of those records?
A. I have.

Mr. Hartpence: That's all.

196 MARTIN O'CONNOR, sworn.

Direct examination by Mr. Hartpence:

Q. Mr. O'Connor, what is your business?
A. Engine house foreman.
Q. Who is your employer?
A. New York Central and Hudson River Railroad Company.
Q. Where are you located?
A. North White Plains.
Q. New York?
A. Yes, sir.
Q. Where were you located in June, 1912?
A. At Granton, New Jersey.
Q. Granton yard?
A. At the engine house, yes.
Q. What was your position there?
A. Engine house foreman.
Q. How long did you hold that position there?
A. For nearly two years.
Q. How long had you been there prior to June, 1912?
A. Oh, about fifteen months.
Q. Did you know Michael Tonsellito?
A. Yes, sir.
Q. Did you have any supervision over him?

A. Yes, sir.
Q. What was Michael's position there?
A. He was employed as a wiper.
Q. What do you mean by a wiper?
A. A person who cleans engines.
Q. What part of the yard did his duties as a wiper require him to be?
A. In the engine house.
Q. Is that sometimes called the roundhouse?
A. Yes, sir.
Q. Did he have any fixed duties in that respect?
A. Yes, sir; he was a wiper and he was all the time—sometimes he was assigned to other duties.
Q. What sort of duties?
A. Cleaning and trimming headlights and sometimes appointed to watch engines when occasion required in the engine house or on the spurs or tracks surrounding the turntable.

197 Q. What are those spurs and tracks surrounding the turntable?

A. Tracks for storing engines on.
Q. Dead end tracks?
A. Sometimes dead and sometimes the engines were alive.
The Court: That is not the question.
A. Yes, sir; dead end tracks.
Q. Do you remember the accident to Michael?
A. I was not there at the time.
Q. Did Michael have any regular hours for working?
A. Yes, sir.
Q. What were his regular hours?
A. Well, he went to work at the regulars hours, at seven o'clock in the morning and was there till six or seven in the evening.
Q. Have the noon hour?
A. Yes.
Q. What was that noon hour?
A. From twelve until one.
Q. In the month of June, 1912, what were Michael's duties there?
A. They were the same as they had been previous.
Q. Was he known as an extra man?
A. No, sir; he was not on the books as an extra man——

Mr. Simpson: I object to that on the ground that the witness cannot give the contents of books in the absence of books. "He is not on the books as an extra man." He is giving the contents of books.
Mr. Hartpence: I consent that the latter part of it be stricken out.
The Court: It should be; it was not called for by your question.

Q. Was he a fireman?
A. No, sir.
Q. Was he subject to your orders or was he not?
A. No, sir.

198 Q. Did he come and do as he pleased and do what he pleased around the yard?

A. No, sir.
Q. You do not do that sort of thing in the railroad service, do you?

Mr. Simpson: I object to it as incompetent and irrelevant and immaterial.

The Court: I will sustain the objection. I think the previous question was proper.

Q. Who was Frederick Ohr?
A. He was a hostler.
Q. What is a hostler?
A. A man who takes engines from the yard adjacent to the engine house, and puts them in and takes them out again; moves the engines around that immediate portion of the yard.
Q. When did he take them in and take them out—under what circumstances?
A. He takes them into that engine house after they have arrived off of their trips. He brings them out when they are to go on a trip.
Q. And he takes them after the regular engineer is through with them?
A. Yes.
Q. Or he takes them out and leaves them some place for the engineer to take them out?
A. Yes.
Q. Was Ohr subject to your directions?
A. Yes.
Q. In your absence who had charge of the work which fell to your lot?
A. The assistant foreman.
Q. Who was the assistant foreman?
A. M. O. Gibson.
Q. You say you were not at the yard on the day that Michael was injured?
A. No, sir, I was not there.
Q. Who was in charge that day?
A. Mr. Gibson.
Q. During the time that Michael worked there and while you were there did you ever see Michael firing engines and running up and down the yard?
A. No, sir, not outside of the engine house.
Q. And inside the engine house he did work, did he not, upon the engines in that way?
A. Yes, sir.
Q. What did he do in that respect, in the engine house?
A. Why, he kept up the fires in the engines by applying coal and get the water to a certain height in the boiler.
Q. Was Michael in the operation of the rules of the yard required to report in the morning to any person when he came to work?

Mr. Simpson: I object to it as calling for a conclusion on the part of the witness; and rules are the best evidence of what he was required to do.

Mr. Hartpence: I did not ask if there was any written rules. I asked him if there was any rule.

Mr. Simpson: How could there be any rule of a corporation unless it is a written rule.

Mr. Hartpence: It might be O'Connor's rule.

The Court: If it was a rule by Mr. O'Connor I should say it was a proper question.

Mr. Hartpence: I will withdraw the question.

Q. Did you have any rule which required Michael to report when he came to work and when he was at work.

A. He had to report the same as all other men.

Q. Well, when he came in the morning could he pick out a particular job he wanted to do and do it, or did he have to obey your instructions or directions?

A. He obeyed my orders.

Q. Did you ever tell Michael that he should do what Fred Ohr, the hostler, told him to do whenever called upon by him?

200 A. When he was assigned to the position of watching the engines he then came under Ohr's orders, as Ohr had charge of the engines while in the engine house.

Q. But that was while they were in the engine house?

A. Yes, sir.

Mr. Simpson: I object to it as leading and ask to have the answer stricken out.

Mr. Hartpence: The question is withdrawn and I consent that the answer be stricken out.

The Court: That may be the order.

Q. Was there any limit within which Michael was to do what Ohr told him?

A. Nothing further than the care of the engines while in the engine house.

Q. Did you ever tell Michael he should do whatever anybody around the engine house asked him to do?

A. Why, no, sir—not without an order.

Cross-examination.

By Mr. Simpson:

Q. Michael did a great many things, didn't he, around the yard?

A. In the engine house, yes, sir.

Q. And outside, on the spurs?

A. Yes, sir.

Q. Outside of the yard—by spurs I means tracks that ran out of the roundhouse on which the engines came from the roundhouse to await the engineers who would take them for the regular duty?

A. Yes, sir.

Q. He wiped engines, he wiped headlights, he was an engine watchman, he pumped the water in the boilers, he kept the fires up he did all that inside and outside on the spurs, didn't he?

A. Yes, sir.

Q. And whenever he did that job of engine watchman, why, Ohr was the man in charge of engines, wasn't he?

A. Yes, sir.

201 Q. And for that part of his employment where he pumped water or kept the fires going, if Ohr was the hostler on the engine, Michael was under Ohr, wasn't he?

A. To that extent, yes, sir.

Q. To the extent of seeing he properly kept up the fires and properly pumped the water and he properly did whatever the duty of an engine watchman was to do?

A. Yes, sir.

Q. When you say he was not a fireman I understand you to mean that he was not a regular fireman such as would run on a freight or passenger train to Chicago; that is what you mean by fireman?

A. Yes.

Q. A man who goes out from the house on to the spur, keeping up the fire on the engine or pumping water up, you do not call him a fireman, do you?

A. No, sir.

Q. What do you call him?

A. An engine watchman.

Q. Engine watchman, and the engine watchman would keep up the fire and pump water in the engine?

A. Yes, sir.

Q. And the hostler was a man who would move the engine, wouldn't he?

A. Yes, sir.

Q. They would not let the engine watchman move the engine?

A. No, sir.

Q. They would not let him put his hand on the throttle where the hostler was the man who took the engine out and brought it back? How many hostlers were there in the Granton yard?

A. One days and one nights.

Q. Mr. Ohr was the day hostler, and who was the night man?

A. I cannot recall his name now—Eichman.

Q. How many engines did you have a day to care for in that yard around the time of this accident?

A. Oh, they would vary—the number would vary.

202 Q. Well, about what?

A. The engines were coming in and going out all the time. We probably turned forty or forty-five engines a day.

Q. How many engine watchmen did you have besides Michael?

A. We had about—two days and two nights.

Q. Who was the other one besides Michael?

A. I cannot recall his name: he was an Italian.

Q. And those two men did all the work on these forty engines or more every day as far as engine watching was concerned, did they?

A. Yes, sir.

Q. Now you were around the yard, generally, as the foreman, weren't you, Mr. O'Connor?

A. Yes.

Q. And you would be pretty well informed as to what was going on around the yard?

A. Yes, sir.

Q. And this spur track to the—or this side track, as they call it, to the storehouse, which is referred to in this case, was that in the Granton yard?

A. Yes, sir.

Q. It is not what you meant as a spur, I suppose?

A. No, sir, not what I referred to as a spur.

Q. What do you mean as a spur?

A. Why, I mean an endless track that branches out or leads out from the turntable, on which one or possibly two engines might be placed for storage.

Q. And had you frequently before the day of the accident seen Michael on an engine with Ohr, Ohr being the hostler and Michael being the engine watchman both in the roundhouse and outside?

A. Around the engine house, yes.

Q. You had seen them there?

A. Yes, sir.

Q. And Ohr being the hostler or boss and Michael being the watchman?

A. Yes, sir.

Q. In that situation who would give Michael orders as to
203 how much coal to put on or how much water to pump?

A. Well, that would depend on what the engine required. If the fire was low in the engine it would probably require three or four or five shovelfuls more than if the steam was up.

Q. Who would tell Michael that?

A. Michael would use his own judgment in that case.

Q. He was left to use his own judgment?

A. In a case of that kind kept the steam pressure up to a certain pressure.

Q. You say Ohr was in charge of the engine. How would he exercise his authority over Michael—tell him when to get on or get off the engine or when to stop or when to commence?

A. No, sir, not at all times, because his duties were fixed. The watchman goes regularly over a certain number of engines. He passes from a certain point in the roundhouse to a certain point and takes care and keeps up the condition that is required on that number of engines.

Q. Suppose Ohr was taking an engine out of the house and he wanted a watchman; he could not fool with the fire or fool with the water—how would he get his watchman to do that?

A. It would not be necessary for him to take one if the engine was ready to go out.

Q. If it was not ready to go out and he wanted it made ready where would he get his watchman?

A. He would call one of the firemen.

Q. And tell him to get on the engine and pump the water?

A. Yes, sir.

Q. Would he do that while the engine was out in the yard o

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while it was passing from the roundhouse to the yard on the spur track?

A. No; not when it would be passing to the spur track, because he would not have any necessity to do that.

Q. You said you had seen Michael outside of the engine house?

A. Yes.

204 Q. What was the necessity of his being outside? The engine certainly had to move from the inside out. What was the necessity of Michael being outside?

A. Those spur tracks I refer to are tracks that are not under cover, they are a continuation of a circle—the roundhouse is a complete circle, and those tracks radiate out from the center.

Q. How far out?

A. Probably fifty feet.

Q. What was the necessity of being out there if the engine is dead so you could not get it outside, unless it was under its own steam—what was the necessity then of Michael being outside on the engine on the spur track?

A. They were not all dead engines out there?

Q. Was he to make them dead?

A. No, sir, he was to keep them alive.

Q. Was he also used as a messenger? Would you send him for a tool that you wanted or one of the men wanted, a tool or wanted a headlight, wanted anything he could carry, would he be sent over the yard for it?

A. Yes, sir.

Q. On different errands?

A. Yes, sir.

Q. Who did you say was the boss while you were away this day?

A. M. O. Gibson.

Q. You said he had to report at a certain time. What time would he report?

A. Seven o'clock in the morning.

Q. Did he have some kind of a card that had to be punched or time clock?

A. Yes.

Q. Did they keep the card?

A. After it was marked by the clerk or punched by the clerk they kept the card.

Q. When they went out to eat their lunch did they have the card marked again?

A. Yes, sir.

Q. What was the purpose of that?

A. To keep a correct record of the time that the man worked.

Q. That is, when he stopped work they punched his card

205 and then the company knew he was not working until it was punched again?

A. Yes.

Q. In other words they wanted to know how much time he took off for his lunch, I suppose?

A. Well, there was a regular time allowed for that.

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Q. If he took more than that he was not paid for it?
A. No, sir.
Q. So that until the card was punched the record was going on that he was at work?
A. Yes.
Q. Now you testified in the last trial, didn't you?
A. Yes, sir.
Q. Do you remember answering as follows: "Frederick Ohr, as hostler, had charge of the engines while in the engine house as to the condition of the fires and water, and so forth, and the engine watchman or pumper, as he is sometimes called, was subject to his orders as far as he—to that extent." Do you remember testifying to that?
A. Yes, sir.
Q. And that is a fact, isn't it?
A. Yes.
Q. Now who would send Michael for a tool, for instance if some body wanted a tool he would send him for that tool—would he have to come to you and say, "Mr. O'Connor, Mr. Jones wants me to go for a tool; please can I go?" or would Jones say, "Michael, go and get me that tool?"
A. Well, Michael was not the tool boy—he was not the tool man. These tools you perhaps refer to are the engine tools that are taken off and placed on the engines when they go out of their trips. He sometimes filled that position as tool man in the tool car.
Q. No; but you said he acted as a messenger?
A. Yes.
Q. Sometimes. When a man wanted him as a messenger was it necessary for Mike to get your permission, or could he go?
206 Suppose a man said, "You go get whatever he wanted," could he go then?
A. The tools the workman would have would not be needed to be brought that way. Of course when I spoke of him as a messenger I referred to his going to the machine shop about a half a mile below to bring up material.
Q. Who would send him?
A. I would send him or the assistant foreman would send him.
Q. Anybody else?
A. No, sir.
Q. Do you know of his ever being sent out by any one beside the assistant foreman?
A. No, sir, I do not.
Q. When Ohr wanted him he would use him as assistant?
A. When I placed him there on that work.
Q. Well, every time do you mean that you individually placed him? He never went on an engine unless you individually put him on the engine?
A. When I placed him as an engine watchman, for instance, wanted a man in the morning on that position, I would place him there as engine watchman, and he was there on that or in that position until his day's work was completed or until he was relieved

Q. And then Ohr could call him whenever he wanted him?
A. Well, in that position.
Q. And you were not there all day of the accident?
A. No, sir.
Q. You don't know what work he was doing?
A. No, sir.
Q. Do you remember being asked this question: "Whatever Ohr told him to do about that he was supposed to do, was he, while he was on engines with Ohr," and didn't you answer, "Yes, sir."
A. I think I did.
Q. Well, is that a fact?
A. Yes, sir.

207 Q. Were you asked this question: "You did not put each individual hostler on the engine, did you, and say 'Jones, take seven, and Brown, take 36'? You don't mean to say that every day you picked out the engine for each hostler?" And did you answer, "No, sir"?

A. I don't remember what I answered.
Q. Is that the fact, that you left it to the judgment of the hostler, or did you tell the hostler which engine to take out?
A. Why, the hostler would take out—when it was time for a certain engine to cover a train the hostler knew there was a board marked for it and he would take the engine out to cover the train, or if there was some special movement wanted, why, I would order it or the general foreman or assistant foreman would order it.
Q. Well, if Gibson said Ohr wanted a barrel of oil up in the storehouse, and you were not there, would Gibson be the man to tell Ohr to go up and get a barrel of oil from the storehouse—take an engine and go up for a barrel of oil?
A. He might do it.
Q. He would be the man if you were not there?
A. Yes; he would be the man in charge.

Mr. Simpson: I want to ask this witness a question which is not cross examination. I would like to ask him as my own witness.

Q. Do you know this locomotive by the numbers it has been given, upon which this accident is said to have happened, 3791?
A. I knew the engine, yes.
Q. How high is the step on that engine on the right hand side from the bottom of the wheels of the locomotive. In other words what distance is there in a straight line from the step down to the bottom of the wheel?

The Court: In other words, that would be the top of the rail?

208 A. It is supposed to be sixteen inches.
Q. Well, do you know what it is?
A. Well, I could not say, because I have not seen them.
Q. Regularly it would be about sixteen inches, that is about a foot and four inches?
A. Yes, that is what it should be.

Redirect examination by Mr. Hartpence:

Q. Do you know what the length of the engine is, Mr. O'Connor?
A. Not exactly.
Q. Well, approximately?
A. Why, I would say from forty-five to fifty feet.
Q. That is just the engine itself?
A. Engine and tender. That would include the tender too.
Q. Forty-five to fifty feet?
A. Yes.

By the Court:

Q. What would be the length of the engine itself without the tender, approximately?
A. Probably twenty-five feet—maybe twenty-eight feet—from twenty-five to twenty-eight feet.

By Mr. Hartpence:

Q. Mr. O'Connor, drawing your attention to the testimony which you gave on the former trial, also at page 171 of the printed book, preceding the question which Mr. Simpson asked you: "Whatever Ohr told him to do about that he was supposed to do, was he, while he was on the engine with Ohr?" and your answer, "Yes," do you also recall being asked this question by Mr. Simpson: "What do you mean by that answer, that Tonsellito was subject to the orders of Ohr?" And did you answer, "As to the care of the fires and the water?"
A. Yes, sir.
Q. That was the fact, wasn't it?
A. Yes, sir.
Q. And the further question, "That is, putting coal on the fire?" and you answered "Yes." Do you remember so testifying?
A. Yes, sir.
209 "Q. And seeing that water was properly supplied to keep the steam?" And you answered, "Yes, sir."
A. Yes, sir.

MYLES O. GIBSON, sworn.

Direct examination by Mr. Hartpence:

Q. What is your occupation, Mr. Gibson?
A. Engine house foreman.
Q. Where?
A. Delaware & Hudson Railroad Company at Cardonic, New York.
Q. Were you ever employed by the New York Central & Hudson River Railroad?
A. Yes.
Q. At Granton, New Jersey?
A. Yes.
Q. When?
A. Why, I came there in 1911 and I was there a little over a year.
Q. Were you there in June, 1912?

A. I was.
Q. Do you remember the accident to Michael Tonsellito?
A. I do.
Q. What was your position there?
A. I was assistant engine house foreman.
Q. Under Mr. O'Connor?
A. Under Mr. O'Connor.
Q. Were you at the yard on the day that Michael was injured?
A. I was.
Q. In charge that day?
A. Yes; Mr. O'Connor was off, so I was in charge.
Q. Did you see Michael that day before he was hurt?
A. Yes, sir.
Q. Did you direct him to go over with Ohr on the engine 3791 get a barrel of oil?
A. No, sir——

Mr. Simpson: I object to it on the ground it is a leading question.
The Court: I suppose you can frame your question in a more eneral way so as to reach the same point.

Q. What was Michael doing that morning, do you remember, Mr. Gibson?
A. He was filling headlights and cleaning them, as I remember it.
Q. Where?
A. Well, in the engine house.
Q. Where were you at the time he was hurt?
A. I could not say just exactly where. Somewhere near the engine house.
Q. When did you first learn of the accident at all?
A. When some one came out and told me he had got his foot urt, and I went into the machine shop, where they brought him, nd they told me he was in there.
Q. How long had it been before that since you had seen him?
A. I couldn't say.
Q. Did you see Fred Ohr that morning?
A. Yes, sir.
Q. You know Ohr, don't you?
A. Yes, sir.
Q. What was his position up there?
A. He was a hostler.
Q. Do you recall when you last saw Ohr?
A. No, sir.
Q. Do you know how Michael came to be over in the machine hop?

Mr. Simpson: I object to that as calling for a conclusion on his art.
Mr. Hartpence: I am asking if he knows.
The Court: If he knows. Do you know of your own knowledge ow he got there?

Q. Do you know how Michael came to be over in the machine hop?

A. Do you mean after he was hurt?
Q. Yes.
A. Well, he was carried in.
Q. Well, had you told him to go there that morning?
A. Go where?
Q. To the machine shop?

Mr. Simpson: I object to it on the ground that it is a leading question.

211 Mr. Hartpence: I will withdraw the question.

Q. Did you direct Michael to do any particular work that morning?
A. I could not say whether I assigned him the headlight job that morning or not. If he had had it the previous day or say two days before that it was the understanding that he should stay on that job until the regular man came back, and I could not say whether he had been on it the day before *it* or whether the regular man was off that day and I had put him on it, I do not recall it.
Q. Well, had you put him on the engine with Ohr that morning?
A. No, sir.

By the Court:

Q. Do you recall whether you had given Michael orders that morning?
A. No, sir, I do not.

Cross-examination by Mr. Simpson:

Q. You did tell Ohr to go up and get a barrel of oil, you remember that, don't you?
A. I did not.
Q. You don't remember that?
A. No, sir.
Q. Do you know anything about a barrel of oil?
A. No, sir.
Q. Did you ever see it that day?
A. No, sir.
Q. Did you see it on the engine when it came back?
A. No, sir.
Q. Were you at the roundhouse when this engine came back?
A. Yes, sir.
Q. You did not see any barrel of oil on it?
A. No, sir, I did not notice it; it might be on the back of the tank where you would not see it.
Q. Were you the man to give orders for the transportation of oil from the storehouse at Weehawken or Granton to Ravina?
A. No, sir.
212 Q. Who was it?
A. The storekeeper did that.
Q. What is his name?
A. Mr. McKee.
Q. Well, how would he get it on the engine? Would he send for an engine to come up?

(Objected to as calling for a conclusion. Question withdrawn.)

Q. What was your system with reference to assigning an engine o get that barrel of oil? Would you have to get an order?

Mr. Hartpence: I object.

A. Not necessarily.

Mr. Hartpence: I object on the ground that this witness has not hown any familiarity with it at all.)

Mr. Simpson: He is in charge of the place.

The Court: He was assistant foreman of the roundhouse in charge f engines on that day. It would seem he had knowledge of the novements of the engines. If he has not he will say so. Overrule he objection.

A. Not necessarily.

Q. How would the engine get it? It would not go up itself, would it?

Mr. Hartpence: I object to it as irrelevant, incompetent and immaterial.

Q. On this day?

Mr. Hartpence: And merely calling for a conclusion on the part f this witness as to how the engine would get there.

The Court: I will permit the question, of course, assuming that he witness, if he does not know, will say he does not know.

Q. How would the engine get up there if you did not have
213 to order it?

A. Mr. McKee might have called out and asked the hostler o brought the engine around there, probably—I don't know the ime he got the order for that oil, but if he got a short order he might ot look for me. He might have went directly to the hostler and sked him to bring that engine around there.

Q. That was permissible, wasn't it?

A. Yes.

Q. Did not have to have your order for it?

A. Not necessarily, no sir.

Dr. EDWARD FENDRICK, sworn.

Direct examination by Mr. Hartpence:

Q. Doctor, you are a practising physician and surgeon?

A. Yes, sir.

Q. How long have you practiced?

A. I have practiced medicine since about 1900.

Q. Where?

A. In Weehawken, New Jersey.

Q. Where were you graduated from?

A. Columbia University, New York.

Q. Had a surgical experience?

A. Yes, sir.

Q. Where?
A. Well, for the last eight years I have been attending surgeon the North Hudson Hospital.
Q. Still there?
A. Yes.
Q. You were there in June, 1912?
A. Yes.
Q. Do you remember Michael Tonsellito?
A. Yes.
Q. Did you perform any operation upon him on that month?
A. Yes, sir.
Q. What were the circumstances?
A. I was telephoned to from the hospital that there was an eme gency case when they came in, so I came up and found Tonselli lying on the bed with a crushed foot, so being a minor—shall describe the injury, Mr. Hartpence?
214 Q. Yes. What did you discover when you saw him lyi there on the bed with a crushed foot?
A. I discovered his entire left foot was crushed, not only the bon but the flesh and the muscles underneath and skin were destroye
Q. What did you do when you discovered that?
A. I came to the conclusion that it was absolutely necessary f an immediate operation, and discovering the fact that he was minor, the operation had to be postponed until the consent of t parent could be obtained?
Q. What did you do in that respect?

Mr. Simpson: I object to that as absolutely irrelevant, what he di in that respect. I am not suing him because the Doctor cut off h foot. The consent of the parent is not relevant. It is relevant if h operated, but whether he got the consent or not is irrelevant.
The Court: I do not know as it is particularly relevant.
Mr. Simpson: I will admit it, that it is a fact.
Mr. Hartpence: I am trying to get the Doctor to tell the stor

A. He was taken then to the—I gave orders for him to be take up to the operating room, and proceeded with the operation.
Q. Was his father present at that time, or wasn't he?
A. His father was present in the emergency room before he ca up to give his consent.

Mr. Simpson: I object and ask to have it stricken out. It cann possibly have any relevancy, whether the father gave his consent not.
Mr. Hartpence: I did not ask it.
215 The Court: If it is not anticipated by the question th is put it may be stricken out.
You are, Doctor, to tell what was done. What your operation w and what you did.

A. After he came to the operating room naturally it was a que tion as to what should be done for the injured foot. In my opini

operated on and saved as much tissue—healthy tissue as I possibly uld.

Q. What did you do in the performance of the operation?

A. You mean the operation?

Q. Yes.

A. Well, it really is not any special operation outside of an amputation of an injured ankle. It is not—it is modified, you might y—modified Chopart's operation.

Q. Did you remove some portion of the foot?

A. I removed the entire—technically—tarsal bones of the ankle, lowing—retaining the heel bone and the astragalus, that is the nnecting joint bone, as being absolutely uninjured and healthy ssue.

Q. How long was Michael under your care there after that?

A. Michael was not under my care after that. Dr. Poole was ere on duty at the time and took care of Tonsellito, post operation.

Q. Have you seen Michael's leg recently?

A. I saw it yesterday.

Q. Is that the first you have seen it?

A. At the trial here.

Q. The first you have seen it?

A. First I have seen it for a long time.

Q. What is your opinion as to the result of the operation?

A. Well, my opinion of the result is that it is all that could be sired.

Q. Who else was present at the operation besides you, Doctor?

A. The house physician, and during the operation I re-
16 member distinctly Dr. Poole arriving in the operating room while I was working, he stayed a little while, and of course paid no further attention to anybody in the operating room, hav-g my mind on the work to be had, and although he remarked he ould be in later on—I remember that absolutely.

Q. In Michael's present condition of his left leg, in your opinion, octor, is any further operation necessary to produce a satisfactory sult for the use of the——

A. Why, no—I hardly think that with a satisfactory result a fur-er operation would be called for. What we have we know; what e may get we do not know.

Q. Is what is left of the left foot, Doctor, able to sustain the weight the body?

A. Oh yes, absolutely.

Q. Without any artificial appliance at all?

A. Yes, sir.

Q. If the left leg were amputated to a point about three inches ove the present stump of the leg would he be able to use it inde-ndently of an artificial appliance?

A. Well, it would be rather a difficult thing for him to stand on a re stump that was three or four or five inches shorter than the her leg. He could not possibly, if he was standing straight on the her leg, have the stump on the floor—he could not bear any weight it because it would — be on the floor.

Q. As it now is he can bear his weight?
A. Yes; he is practically standing on his heel.
Q. Is there any artificial appliance that can be utilized in t present condition to aid that still further?
A. With a properly fitting foot or shoe he would have absolut no trouble in walking, with scarcely a noticeable limp.
Q. With a properly fitting shoe or foot should he be able to w as you have said without friction to the tissues?
A. A properly fitting shoe is one that prevents friction.
217 Q. And did you examine the shoe that he was wearing terday?
A. No, I did not.

Cross-examination by Mr. Simpson:

Q. You are testifying as an expert for the New York Central day for a fee, I suppose, aren't you?
A. I—Ha, ha—that is rather a peculiar question, Mr. Simps I have not made any agreement or signed any contract as far as are concerned.
Q. No, you will be rather cross and depressed if you do not g fee?
A. That may be so, I do not know.
Q. Now, Doctor, you saw this boy's leg, the one that was exhibi to the jury yesterday?
A. Yes.
Q. Did you see the irritation that Dr. Arlitz pointed out?
A. Yes.
Q. That is an abnormal condition, that irritation, isn't it?
A. Any irritation is abnormal.
Q. That is painful, Doctor; it is an indication of pain?
A. From the irritation, yes.
Q. Yes, from the irritation. If this leg was cut off, the operat that Dr. Arlitz describes, and an artificial limb fitted to this stu there would not be any irritation, would there?
A. Well, comparing an artificial limb, Mr. Simpson, with a stu and his foot now with that shoe—if we had an artificial limb m exactly as or as poorly as his shoe is made to-day, we would h irritation on any stump.
Q. Doctor, I am afraid you are arguing this case. You are answering my questions. Will you read the question?

(Question repeated.)

A. I should like to qualify by stating a properly fitting artifi limb.
218 Q. You can say that?
A. It would cause no irritation, no.
Q. There would not be any irritation?
A. No.
Q. You did this job—this is your job?
A. It is my operation—it is an emergency operation.

Q. You cannot put yourself in the frame of mind where you uld say it is a bad job, would you?
A. Why, the results of a job, Mr. Simpson, are—one's opinion o a good or bad job depends on the results. The results of this as you call it——
Q. I do not want to offend you by a term?
A. I am not taking any offense.
Q. Use the word that you like.
A. The results of this operation are in my opinion as good as any mp operation. The results justified the operation.
Q. You were interested, of course, in this operation?
A. I am interested in the boy, yes.
Q. You did this operation how long ago?
A. Two years ago.
Q. And you say this irritation is caused by a bad artificial shoe foot, don't you?
A. I did not—I say it could be caused.
Q. Well, it is. Let us get this plain.
A. Yes, all right, it is.
Q. And yet with all your great interest in this boy whose foot you k off two years ago, you have never been to see him once to see ether he had a good artificial foot, have you?
A. Why should I go to see him?
Q. Well, have you, Doctor?
A. I have not—I beg pardon; except I have taken off the foot.
Q. Now; I mean since the time you operated on this boy and dis-arged him as cured you have never seen him once to see what kind an artificial foot he had, although you were so much interested in him, have you?

The Court: The real question is since the operation and since he passed out of your direct charge have you seen this y or examined his foot or his stump?

A. Well, if the court please, he has never been directly under my arge, because immediately after the operation he went under the e of Dr. Poole.

The Court: Exactly so.

A. Since that time to the present time I have seen him several es.
Q. Have you examined his stump, taken off his shoe and said to n, "Michael, you are wearing a bad shoe, go and get a good shoe"?
A. The last time I saw him he had no shoe on.
Q. When was the last time you saw him?
A. I think it was several months after he was out of the hospital.
Q. Didn't have any shoe?
A. No.
Q. So up to that you had no information that he ever had a shoe, ept as you saw?
A. Up to the present time I had no information.

Q. You knew he could have a perfectly good result if he had th right kind of a shoe?

A. Yes.

Q. You are very much interested in it?

A. Yes.

Q. You never took pains to find out whether he had any kind a shoe?

A. Why should I?

Q. Well, did you?

A. No, I did not. He was not my patient.

Q. You say he can bear his whole weight on this stump. Yo mean if he did not have any appliance at all that he could stum around the court room here without anything, just his cane?

A. That is my opinion, yes.

Q. On this irritated stump?

A. I did not say irritated stump. On the stump.

220 Q. On this stump, with that irritation, he could go aroun this court without anything and bear his weight of hi body up?

A. Yes, in my opinion he can.

Q. So he don't need any shoe or anything?

A. Wouldn't need a shoe.

Q. He could get along without it?

A. He could get along without it.

Q. Isn't it a fact that modern surgery has discarded all such ope ations as you performed on this boy's foot, as Dr. Arlitz testified ye terday?

A. Well, as Dr. Arlitz testified, Mr. Simpson, he testified in ope ations being performed to-day—amputations merely on selecte cases, not in emergency cases, not in cases where there are grave po sibilities both as to life, as to further infection of that injured foo and several other things that are taken into consideration in a emergency cases. There is a vast difference between selected ope ations, where you have your time, when the only result looked for i not a question of life, it is a question of further utility of a limb— that is a selected case. We would not under those circumstance if we had a perfectly clean case, we would not do an emergenc operation.

Q. What kind of an operation would you do?

A. We would probably do either a disarticulation—of course it a depends on the judgment of the attending surgeon and the cond tion of the patient.

Q. But in your judgment now this is not an emergency case an more?

A. In my judgment at the present time, in the case of Tonse lito—my judgment would be to leave well enough alone; in a operations there is a certain amount of risk.

Q. What risk would there be with a boy in good health like h is, with his blood good and his heart and his lungs very good, to ta off three inches that Dr. Arlitz told. What would be the risk if y could get an artificial limb?

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(Objected to on the ground that it assumes facts that are not in this case. Question withdrawn.)

Q. Assuming that this boy is in good health, what danger would ere be in performing this operation that Dr. Arlitz speaks of?

Mr. Hartpence: I object on the ground it is not a proper hypo-tical question, because there is no proof in the case that he is in od health.

Mr. Simpson: That is assumed, it is not necessary to prove it.

The Court: I will overrule the objection.

A. Do you mean assuming that Michael Tonsellito is in good alth?

The Court: Yes. Repeat the question.

(Question repeated.)

A. Why, the danger would be in the uncertainty as to whether newly-performed operation would become infected, in the first ace, and in the second place as to whether the tissues—whether his ility of healing—his healing ability is very good. Those two ings have got to be taken into consideration.

Q. Then in your judgment——

A. Those two risks are taken by the patient.

Q. In your judgment the present condition is the best one—better ave it as it is?

A. In my judgment.

Q. In my judgment?

A. In my judgment, yes.

Q. What experience have you had? Have you made a specialty surgery?

A. Yes, sir.

Q. A specialty of it? You do nothing but surgery?

A. No; I do more surgery than general practice.

Q. You are a general practitioner?

A. In a way, yes; I do not take every case.

Q. Do not take every case where you can cure a man?

A. Where I can absolutely, yes.

Q. Do you take generally—you are a general practitioner—a lady as a pain or a gentleman has a pain and would consult you?

A. Yes.

Q. What I want to find out is whether you do or do not exclu-vely apply yourself to surgery?

A. No; I do not exclusively apply myself to it.

Q. Where is your office, Doctor?

A. 74 Highwood Terrace.

Q. In West Hoboken?

A. Weehawken.

Q. Are you regularly in the employ of the New York Central? o you do work for them?

A. Yes.

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Q. And the West Shore?
A. Yes.
Q. How long have you been doing that?
A. I believe the last four or five years.
Recess.

FREDERICK OHR, recalled:

Direct examination by Mr. Hartpence:

Q. Mr. Ohr, what is your occupation?
A. Hostler.
Q. By whom are you employed?
A. New York Central and Hudson River Railroad Company.
Q. How long have you been so employed?
A. About thirteen years.
Q. Where have you been stationed?
A. Kingston, Weehawken, Granton and New Durham.
Q. How long have you been at Granton?
A. Since 1910.
Q. Do you know Michael Tonsellito?
A. I do.
Q. Do you recall an accident to him in June, 1912?
A. I do.
223 Q. Were you present at the time it occurred?
A. Yes, sir.
Q. Where were you?
A. On a locomotive, 3791.
Q. Were you in charge of that locomotive at the time?
A. Yes sir.
Q. Running it?
A. Yes sir.
Q. Running it from what point to what point?
A. From the roundhouse to the storehouse.
Q. From the roundhouse where—from the roundhouse located where?
A. The roundhouse located at Granton to the storehouse located at Granton.
Q. How far away from the roundhouse was the storehouse?
A. Why, about fifty feet.
Q. In order to get to the storehouse from the roundhouse which way did you go?
A. South and then north.
Q. Switching from one track to the other?
A. Yes sir.
Q. And going back on what they called the storehouse track?
A. Yes sir.
Q. Where did Michael get on the engine?
A. The toolhouse, situated just south of the roundhouse.
Q. How did he come to get on there, do you know?

Mr. Simpson: I object.

A. By his own accord.

Mr. Simpson: I object on the ground it calls for a conclusion. That the circumstances were of course I have no objection to.

Mr. Hartpence: All I wanted if he asked him or how he came to get on.

Mr. Simpson: It calls for a conclusion. What was said or done I have no objection to.

Mr. Hartpence: I do not think, if I ask him if he knows, it is a conclusion.

24 Mr. Simpson: I object to it on the ground it is not relevant. We want what the fact is.

The Court: If he says he does not know of course there is no use of having any argument.

Do you know? The answer is yes or no.

A. Why, I presume he got on——

The Court: No, no. Do you know?

A. I don't know.

Q. Well, did you see him get on?

A. I did, yes sir.

Q. What did he do when he got on?

A. Well, he didn't do much of anything. He put a little coal on the fire and then sat down, and then sat down on the left hand side.

Q. Did you say anything to him before he got on?

A. Yes.

Q. What did you say?

A. I says, "Mike, give me a shovel and a hook."

Q. What did he do when you said that?

A. Brought the shovel and hook and put it on the engine.

Q. Well, what happened after that?

A. Well, we proceeded on down to over the ash pit.

Q. Did you go on around up to the storehouse track?

A. Yes sir.

Q. Where did Michael get off the engine?

A. I don't know.

Q. Did you see him get off there at the place where he was hurt?

A. No sir.

Q. Where was he hurt, at what point?

A. Why, just south of the switch leading into the storehouse.

Q. I show you that blue print marked Exhibit P-5 and ask you if you have ever seen that before?

A. I have, yes sir.

25 Q. When?

A. At the last trial.

Q. Do you know what it is a blue print of?

A. Why, a section of Granton yard.

Q. Will you walk over to it, please, and indicate, if you can, where the storehouse is located on this plan that you refer to?

A. Right here (indicating.)

Q. Now where is the switch that you have referred to?

A. Right here (indicating.)
Q. It is marked I-J?
A. I-J.
Q. Where was Michael injured?
A. This, E-F.
Q. At the point marked E-F?
A. Yes sir.
Q. What occurred at the time of the injury?
A. What do you mean?
Q. What took place there?
A. After he was hurt?
Q. Yes; you say he was injured. What happened to him?
A. Why, he got his foot crushed, that is all that happened to him
Q. Did you see how it happened?
A. Yes.
Q. How did it happen?
A. Why, we were moving her slowly from that switch, A. B——
Q. Is that also indicated as a switch?
A. This switch right here (indicating).
Q. The switch X?
A. X, to this switch I-J.
Q. Yes.
A. And proceeding here. I was shutting off an injector in the front of the engine on the right side, and I had to stand up, and when I looked out the window Michael was about to jump on the engine, and as he jumped he missed the whole engine, but I called to him, "Mike, don't jump," but he jumped and his left foot went under the wheel, and I stopped the engine immediately and he rolled on the bank.
Q. At what point was that with relation to the bulge in the air pipe that is located there; was it south of it or north of it?
A. South.
Q. Do you know about how far south it was approximately
226 A. I should think about twenty-five feet, something like that.
Q. South of what?
A. This L in the air pipe.
Q. At what part of the engine was he jumping when you saw him?
A. Between the tank and engine.
Q. Is that where the steps are located?
A. Yes sir.
Q. Do you recall about how far the engine moved after you saw him jump?
A. Well, not over six inches.
Q. Who threw the switch at I-J, do you know?
A. I don't know.
Q. When had you last seen Michael before that?
A. Why, I saw him, as I got off the engine down at the shop to throw a switch.
Q. Which shop was that?

A. Machine shop.
Q. Where is that located?
A. South of the ashpit, roundhouse.
Q. Where was Michael then?
A. Sitting on the engine.
Q. On your engine?
A. Yes, sir.
Q. What part of it?
A. Left hand side.
Q. Is that the fireman's side?
A. Fireman's side.
Q. You were on the engineman's side?
A. Yes.
Q. Anybody else on the engine with you?
A. No sir.
Q. At the time Michael was hurt was there anybody else on the engine?
A. Why, not to my knowledge; I don't think there was.
Q. Where was McKee?
A. Why, I presume he was on the ground, from all I know.
Q. Had he been on the engine?
A. He had not—not to my knowledge.
Q. When did you first see McKee?
A. On that day?
Q. At the time of the accident?
A. Why, naturally, McKee threw these switches here.
227 Q. Mr. McKee threw that switch?
A. Yes, that switch was wrong.
Q. Where was he when he threw that switch?
A. On this side of the engine, right here (indicating).
Q. Had he been on the engine before that?
A. Not to my knowledge.
Q. Do you know whether he got on the engine at that switch or not?
A. He did; he got on the pilot.
Q. On the pilot? Well, was he still on the pilot as you proceed from the switch X to the switch I-J?
A. Well, he might have been, from all I know.
Q. But you could not see him from where you were?
A. No sir.
Q. How far away from the switch I-J was the front part of your engine, the pilot itself, when you stopped?
A. I should imagine from eight to ten feet.
Q. And you say you had not stopped?
A. No sir.
Q. At the time that Michael—at the time you saw Michael jumping?
A. No sir.
Q. Did you tell Michael to get a shovel and a hook and jump on the engine and fire for you?
A. No sir, I told him to get a shovel and a hook.

Q. How long had you known Michael around there?
A. Oh, I know Michael since he was a boy about that high (indicating).
Q. Before he went to work there at Granton?
A. Yes, sir.
Q. What was his work at Granton, if you know?
A. Wiper.
Q. What do you mean by wiper?
A. Wiping engines.

228 Q. Previous to this accident, Michael, had he been out on engines with you in the yard firing for you from fifty to a hundred times?

A. No sir.
Q. Had he ever been out on the engine firing for you?
A. No sir.
Q. Where did you go after the accident occurred with your engine?
A. I went up to the storehouse and got a barrel of oil and went back to the roundhouse with the engine.
Q. What time was that, do you know, when you got back there?
A. Oh, I should think it would have been about 1.25 or something like that.
Q. Do you know what time it was when the accident occurred?
A. About ten minutes of one.
Q. Do you know what time it was when you left the toolhouse to go around on the storehouse track?
A. About half past twelve.
Q. Did you examine the track at all after the accident?
A. No sir.
Q. Did you see it as you came back on your engine?
A. See the track? Yes, sir; I passed over it.
Q. Did you see anything on the track that would indicate the occurrence of the accident——
A. Yes sir.
Q. —to Michael? What did you see?
A. Some blood.
Q. Where was that?
A. On the air pipe.
Q. And at what point?
A. The point at E-F; there is a joint in the airpipe right there
Q. Do you know what became of Michael after he was hurt?
A. Yes sir.
Q. Did you do anything with him?
A. Yes.
Q. What did you do with him?
A. Helped to carry him up to the machine shop in the round house.
Q. Had you ever seen before that occasion this engine 3791?
A. Oh yes, every day that she was on that job or any other job.

229 Q. Were there any other engines of that same type ou there?

A. About four of them.
Q. Do you know the length of the engine, approximately?
A. It is—not possibly, I cannot say.
Q. Approximately. Can you tell approximately?
A. She is from forty-five to about fifty-five feet, I should imagine.
Q. From what point to what point?
A. From the tank to the pilot.
Q. Well, take the engine itself, separate from the pilot, what would be its length?
A. Well, about thirty-eight feet.
Q. By the tank you mean what?
A. Where the coal and water is kept.
Q. Sometimes called the tender?
A. Tender.
Q. That is separated, isn't it, from the engine itself?
A. Yes, by two pins.

Cross-examination by Mr. Simpson:

Q. Did you measure this locomotive at any time since the accident?
A. No, I have not.
Q. Then you are only guessing what the length of it was?
A. I presume that is the length, yes.
Q. What do you mean by presuming; do you mean that it is your judgment of the length of it?
A. Yes, sir.
Q. Who told you to get this barrel of oil?
A. Mr. McKee in the first place through Mr. Gibson.
Q. You say now Mr. McKee told you. At the last trial you were a witness, weren't you?
A. Yes, sir.
Q. And Mr. McKee was not in the court room then, was he?
A. No sir.
Q. You were asked this question: "Who ordered you to take this engine up to the storehouse?" and you answered: "Myles Gibson."
A. He did, yes sir.
230 Q. Is that the man that was in court to-day and said he did not order you to take that up?
A. Yes, sir.
Q. You say he did order you to take it up?
A. Yes, sir.
Q. What did he tell you?
A. He told me that McKee wanted a barrel of oil from the storehouse, and shortly after that McKee came and told me.
Q. I do not care anything about McKee. What did Gibson tell you about taking this engine up?
A. Take train one's engine out of the storehouse.
Q. That Gibson told you?
A. Yes, sir.

Q. Sure about it?
A. Yes, sir.
Q. All right. Where was the engine when he told you that?
A. In the roundhouse, dead.
Q. Where was this plaintiff?
A. Who, Michael?
Q. Yes.
A. I don't know where he was at the time they told me.
Q. Well, the engine was dead when he told you?
A. Yes, sir.
Q. What time was that?
A. About eleven o'clock.
Q. What do you mean by dead?
A. No fires at all in it.
Q. What time did you see the plaintiff?
A. Who, Michael?
Q. Mike?
A. About half past twelve.
Q. What did you say to him?
A. "Give me a shovel and a hook, Mike."
Q. Did he get it?
A. Yes.
Q. He got up on the engine?
A. He got on the engine, yes, sir.
Q. You said he put some coal on it; where was the engine when he put coal on it?
A. In front of the tool car.
Q. How much coal did he put on?
A. I couldn't imagine how much he put on.
Q. Don't know how many shovels he put on the fire?
A. No, sir.
231 Q. Did you move the engine then?
A. It was moving.
Q. It was moving at the time he was putting coal on?
A. Yes, sir.
Q. What were you doing while he was putting coal on?
A. I was looking out the window, backing up.
Q. You were running the engine and he was putting coal on?
A. Yes, sir.
Q. You had not called him on the engine to be your fireman?
A. No, sir.
Q. You did not tell him to put any coal on?
A. No, sir.
Q. He was on the engine while you ran the engine after you had asked him to get a hook, and he was putting coal on the fire?
A. Yes.
Q. You did not put him off the engine?
A. No, sir.
Q. You kept on running the engine. Where did he go when he got through putting the coal on, what side of the engine did he go on?

A. On the left side.
Q. On the left side?
A. On the left side? A. Yes.
Q. What was the first switch you come to?
A. The switch just south of the ash pit.
Q. Who threw that switch?
A. A regular switchman.
Q. What is his name?
A. Why, the regular switchman there, his name is Charlie Anderson.
Q. Is he here to-day?
A. No, sir.
Q. All right.
A. But he was not there on that job that day either.
Q. Who was the man?
A. Joe Miller.
Q. Did Miller throw the switch?
A. Yes sir.
Q. Is he here to-day?
A. No sir.
Q. Where is Miller?
A. In Germany.
Q. He was not here at the last trial either, was he?
A. No sir.
232 Q. He was not in Germany at the last trial?
A. Yes sir.
Q. Now the second switch, who threw that?
A. I did.
Q. You got off and threw that?
A. Yes sir.
Q. Tonsellito did not get off and throw it?
A. No sir.
Q. But when you came up you found Tonsellito still on the engine?
A. Still on the engine.
Q. You did not put him off?
A. No sir.
Q. You did not tell him you did not need him as a fireman?
A. No sir.
Q. Where was he on the engine?
A. Sitting on the seat box.
Q. Looking out the left hand side?
A. Yes sir.
Q. You were looking out the right hand side?
A. Yes sir.
Q. Now when you came up to the third switch, who threw the third switch?
A. Mr. McKee.
Q. Mr. McKee?
A. Yes sir.
Q. That is the man who was a witness yesterday?

A. Yes sir.
Q. He was not in court at the last trial, was he?
A. No sir.
Q. Do you mean by Mr. McKee the man that says he thinl Tonsellito threw the switch that you now say he threw? Do y mean that is the man that was yesterday on the stand and sa that he did not think he threw any switches, he thought Tonsellito- is that the man you mean?
A. Yes, sir.
Q. You say he threw it?
A. Yes.
Q. What was the switch that you were coming to when the a cident occurred, the fourth or the fifth switch?
A. Fourth.
Q. It was the fourth—only four switches? You only went throu three switches before this?
A. I went through many switches, but they don't have to throwed.
233 Q. Three that were thrown, is all?
A. Yes.
Q. Did you see McKee or did he speak to you after he threw t third switch?
A. No sir.
Q. He did not speak to you or say anything; just threw t switch and got on the pilot again?
A. Yes sir.
Q. And then you went on, did you?
A. Yes sir.
Q. Do you remember testifying in the last trial: "I picked McKee right here at this switch, indicating the next switch to l McKee got on the front of the engine and gave me a signal come ahead, and from there I proceeded to this switch. McK got off and throwed this switch and let me out on to this base li and then I was proceeding very slowly." Did you so testify?
A. Yes sir.
Q. Well, he did say something to you?
A. Yes; not after I passed that switch and gave me a signal come ahead.
Q. He did say come ahead?
A. With the hand.
Q. You said a minute ago he didn't say anything?
A. He didn't say nothing to me.
Q. What did he do?
A. He gave me a signal to come ahead.
Q. He was the man who was testifying yesterday?
A. Yes sir.
Q. You say he threw that switch?
A. Yes sir.
Q. And Tonsellito did not throw it?
A. He went from the storehouse over there to throw them swit himself.

Mr. Simpson: I ask to have that stricken out.
The Court: Yes.

Q. Did you see him throw this third switch yourself?
A. Yes.
Q. Did you see him after he threw it?
A. Not after he got on the engine again.
234 Q. You did see him get on the pilot?
A. I presume he got on the pilot; he got on the front of the engine.
Q. Did not see him again?
A. No sir.
Q. Where was Tonsellito when he threw that switch?
A. Why, might have been on the engine yet from all I know.
Q. You were right in the cab there?
A. That is all right; I wasn't looking that way all the while, the left hand side.
Q. You knew whether Tonsellito was in your engine after you passed the third switch, didn't you?
A. I don't know whether he was or not.
Q. Did you see Tonsellito get down on the right hand side as McKee testified yesterday?
A. No sir.
Q. And walk along the right hand side of your engine and throw the switch and walk back on the right hand side of your engine?
A. I did not.
Q. You didn't see any of it at all, did you?
A. No sir.
Q. You were going right up to this switch I-J without knowing whether it was right or wrong, didn't you?
A. Well, I could see if a switch was right or wrong.
Q. Did you see?
A. Yes sir.
Q. Then you did look at it and you knew it was all right?
A. I knew when I came to a stop whether they are right or wrong.
Q. You did look at it?
A. Whether they throwed it or not I don't know.
Q. Eh?
A. Whether the switch was throwed or not I don't know.
Q. Did you know that when you came up?
A. No sir.
Q. You proceeded along without knowing whether this switch was right or wrong?
A. Yes.
Q. You didn't know whether Tonsellito was in your engine or not?
A. No sir.
235 Q. Where was your engine, the head of your engine, when you say you saw Tonsellito jump for your engine? Where was the head of your engine, the pilot?
A. Well, it was from about eight to ten feet away from I-J.
Q. Was it moving or stopping?
A. Moving.

Q. How near did you get to I-J before you stopped. When you came to a dead stop how far were you?
A. I think about six or seven feet, something like that.
Q. You only went one foot then?
A. About that.
Q. One foot after you saw Tonsellito?
A. Jump for the engine.
Q. And your engine came to a stop about six feet away from the switch?
A. Yes.
Q. It is not true that you stopped, as McKee says, and then went on and then stopped again two feet away from the switch, is it?
A. No sir.
Q. That is not true?
A. That is not true, no sir.
Q. You never made any stop between the third switch and I-J until you stopped for all time after the accident, did you?
A. No sir.
Q. You only made that one stop?
A. That is all.
Q. You did not stop to let Tonsellito off the engine to throw the switch and did not start up again without looking whether he could get on again or not, did you?
A. No, sir.
Q. Was Tonsellito on the fireman's side?
A. Yes sir.
Q. That is the regular fireman's position, isn't it, on the engine?
A. Why, yes, when he hasn't got any coal to put in, and sets up on the seat.
Q. And looks out ahead of him?
A. Yes.
Q. On the left hand side of the track?
A. Yes.
Q. You did not need any fireman; you were going to run
236 this engine without anybody looking out on the left hand side at all, weren't you?
A. Well, I work alone all day long.
Q. You were going to do that?
A. Yes.
Q. You were going to run this engine through the yard and simply be alone in it yourself and look out the right hand side?
A. Yes, sir.
Q. You could not see out of the left hand side from your right hand seat, could you?
A. Not very handy, no sir.
Q. Now you were sworn at the last trial, so you say, and you did not tell us anything about any blood on the air pipe at the last trial, did you?
A. There was not anything asked about it.
Q. You did not tell it, did you?
A. No sir.

Q. You have told a great deal to-day without being asked for haven't you?
A. No sir.
Q. Now how far do you now say your engine was from this ritch when the accident happened?
A. From about six to eight or ten feet.
Q. Six to eight or ten feet. How much steam did you have on ie engine when you started that day?
A. Out of the roundhouse?
Q. Before Tonsellito put the coal on?
A. About eighty pounds.
Q. How much did you have on when you left it at the engine ouse for the regular engineer to take it?
A. Well, I could not really say; maybe one hundred and twenty o one hundred and eighty.
Q. Now before this day Tonsellito had been working under you s an engine wiper, as you call it, or watchman, hadn't he?
A. At times, yes.
Q. And he had put coal on the fire, hadn't he?
A. Yes sir.
Q. And pumped water up in the boiler?
A. Yes sir.
237 Q. And how often had he done that while you have been a hostler?
A. Oh, maybe once a month, once a week, or something like that, according to how a man — being laid off.
Q. Well, for how long a time?
A. I cannot tell you.
Q. Can't tell me how long a time he had been doing that?
A. No; might have been since he was there? I was five months absent while he was there, but on the job.
Q. When was the last time you saw him before you saw him jumping for the engine?
A. Why, when I throwed the switch at the shop.
Q. Where was he then?
A. Sitting on the seat box.
Q. Now to get down on the right hand side of the engine, he had o pass you, didn't he?
A. Pass my back, yes.
Q. And he had to walk in the direction you were looking? You were looking out the right hand side of the window?
A. Yes sir. I was not looking outside.
Q. Working the injector?
A. Yes.
Q. You did not see this man until, as you say, you looked out and saw him jumping for the engine, and you then said, "Don't jump," but he had jumped?
A. He was jumping then.
Q. He had jumped then? When you cried out, "Don't jump," he had jumped?
A. Yes.

Q. This engine had a step only sixteen inches from the ground, didn't it?

A. About that.

Q. It was moving very slowly? About two or three miles an hour?

A. Yes.

Q. No danger in his trying to swing on an engine going at that rate of speed if the ground was perfectly level there, was there?

A. No, sir.

Q. Why did you holler to him then, "don't jump"?

A. Because it is a rule for nobody to jump on an engine when it was moving.

238 Q. Persons jump on moving trains there, don't they?

A. Not supposed to.

Q. Not on moving trains?

A. No, sir.

Q. You mean a freight car stops every time a brakeman gets on it?

A. Why, I don't say that, but they take their own risk when they do it.

Q. You mean to say in the operation of a freight yard that every time a brakeman gets on and off a train that the car stops?

A. No, but — his own lookout when he does that.

Q. That is what you want to impress on us, that when you saw this man trying to switch on this engine, the engine moving only two miles an hour, that you hollered to him, "Don't jump"?

A. Yes.

Q. That was after he had jumped?

A. Yes sir.

Q. That was the first time you saw him, wasn't it?

A. Yes.

Q. And the last time you saw him was when he got off and threw a switch?

A. Yes sir.

Q. How far was that from where the accident happened?

A. Oh, about a quarter of a mile.

Q. A quarter of a mile? So you don't know whether he was on your locomotive for a quarter of a mile or not?

A. No sir.

Q. Although you were in the cab all the time?

A. Yes, sir.

Q. And if he was there he would be on the left-hand side of the cab, and you never saw him on the locomotive?

A. Yes sir.

Q. You did not see him get off and you did not see him until you say you saw him jumping?

A. No sir.

Q. What do you mean by jumping. Just show the jury what you mean? Do you mean he jumped with two feet or that he tried to swing on with one foot, or what do you mean by it?

A. Why, tried to swing on with one foot, just the same as you demonstrated.

Q. Just grabbed and tried to put his foot on?
A. Yes sir.
Q. You knew that was not very very dangerous with an engine ing two miles an hour, and yet you said, "Don't jump"?
A. Going any speed at all.
Q. Going a mile an hour?
A. Yes.
Q. It would be very dangerous?
A. Anyway if you slip and fall under a wheel.
Q. Now when your pilot stopped it was how far from this switch J?
A. About—what, after the accident?
Q. Yes. The only time it did stop was after the accidnet?
A. Six or seven feet. Why, we stopped down here at A-B, would e fifty feet away or a hundred.
Q. When you went through the last switch you never stopped rom that time until you stopped at the accident, did you?
A. No sir; about from six to eight feet.
Q. Your pilot was then from six to eight feet, was it?
A. About that, yes.
Q. Did you get off then or did you go right off then after the arrel of oil?
A. No sir; I got off and I helped to carry him to the roundhouse.
Q. Who helped you carry him?
A. Why, a couple more men there.
Q. Did they have him up before you got down?
A. No sir.
Q. He was on the ground?
A. Yes sir.
Q. Where do you say the blood was on the air pipe?
A. Well, there is no mark on the air pipe there, but there is—got a picture?
Q. Yes; I have got two pictures. (Photographs produced and shown to witness.)
A. Right about there (indicating).
Q. Mark it with a pencil, will you? (Witness complies.)
A. A crooked tie right there. Between that joint and that crooked tie.
Q. At that time the pilot of your engine was within how many feet of the switch?
A. About six to eight feet.
Q. Six to eight feet of the switch. This air pipe is right next to the rail, isn't it?
A. Right up close, yes.
Q. And is that the only place there was any blood on the air pipe?
A. Yes.
Q. Wasn't any blood on the rail, at all?
A. I didn't take notice, because the air pipe was white.
Q. You took notice enough to examine that blood stain, didn't you?

A. Couldn't see the rail as I was going back, I could see the air pipe, that is all.
Q. You saw it from your engine?
A. Yes.
Q. You did not get off and look at it?
A. No sir.
Q. How far away from it were you when you came back on your engine when you saw this thing that you say was a blood stain?
A. Why, I should think it was about five or six feet.
Q. What do you mean, that you looked down on it as you went over it?
A. Yes sir.
Q. This engine, you say, is thirty-five feet from the cab to the pilot?
A. I know, but I am looking down on the ground.
Q. As your engine goes over it you were looking down; you were not looking ahead of you where your engine was going, but you were looking down for blood stains?
A. No; I happened to look down to that, where that spot was, when I was going back.
Q. You did not look back where this pipe curves out, did you?
A. Why, I noticed that pipe, yes.
Q. Did you look down there for blood?
A. No.
Q. Did not look there at all?
A. No; there was no necessity for I knew right where it was.
Q. You just happened to look down here?
A. I knew where I picked the man up.
241 Q. You happened to look down here?
A. Yes.
Q. You did not get down to look at it?
A. No.
Q. How big was this blood stain that you saw; how large was it?
A. I cannot tell you.
Q. Big as a quarter?
A. Yes, bigger.
Q. As big as a barrel head?
A. No.
Q. How big was it?
A. About as big as your hand.
Q. Ever go back to look at it after your engine passed?
A. No sir.
Q. Never went back to look at it?
A. No sir; didn't have time.
Q. Just made your judgment from the engine cab?
A. Yes sir.
Q. In your opinion it was blood?
A. Yes, sir.
Q. Any blood on the ties?
A. Not as I know of.

Q. Not as you know of? You are still working for the New York Central, aren't you?
A. Yes sir.
Q. You testified in the former trial as follows, didn't you: "Q. You were going right on without knowing whether the switch was open or not, is that right, or whether it had been thrown or not? A. Why, no. When I got to that switch I could stop; I had about twenty or thirty feet yet," referring to the time of the accident. Did you so testify?
A. Yes sir.
Q. Did you have twenty or thirty feet before you got to the switch when the accident happened?
A. Oh, why, no.
Q. You had not?
A. I had eight to ten feet.
Q. Now this man had frequently been on the engine with you, this Tonsellito, and put coal on fires and pumped water up, didn't he?
A. Yes.
Q. You were hostler, weren't you?
A. Yes.
Q. What did you do, take engines out of the house on to the spur tracks?
242 A. Took them out of the house and took them in the house and put them on spurs.
Q. When he was on the engine what would you order him to do?
A. Why, asked him how the fire was. If he say all right, the fire would be all right. If he say the fire was not much good, the fire builder just got off, I say fix it up a little bit.
Q. Fix up the fire?
A. Yes.
Q. What would he do next to that fire?
A. Put coal on and hook the fire up.
Q. Hook up, would he?
A. Yes.
Q. Did you ever hook or hook up the fire when you told him to put the hook on?
A. Yes sir.
Q. But you did not hook up the fire yourself, did you?
A. No sir.
Q. Although you asked for the hook to hook up the fire you did not hook it up?
A. I did not.
Q. You did not want him on the engine at all, did you?
A. I did not need him.
Q. He was no good to you on the engine?
A. No sir.
Q. He was no good to fire?
A. No sir.
Q. But he did fire, didn't he?
A. He did, yes sir.

Q. He did put on coal, he did sit on the left hand side?
A. Yes, sir.
Q. You did not put him off?
A. No sir.
Q. You let him sit on the engine, and as far as you knew h was on the engine until the time he was hurt, wasn't he?
A. Yes sir.
Q. You did not have him on your engine for your fireman?
A. Didn't make any difference.
Q. You did not say, "Mike, come on and fire this engine; be m fireman," did you?
A. No sir.
Q. What do you mean, "Didn't make any difference"?
A. Because he wasn't any good to me.
Q. He put coal on the fire?
A. That is all right; I could have done that myself.
243 Q. But you didn't do it yourself?
A. I know I didn't.
Q. He hooked up the fire?
A. Yes sir.
Q. You did not do that?
A. I know it.
Q. And as far as you seemed to act it made no difference to y whether he was on the engine or not? Now when you got up that switch you knew somebody had to turn it at I-J, didn't yo
A. Yes, sir.
Q. You knew that you were going through that switch, I-J, didn you?
A. Yes.
Q. You did not look out to the right, did you, where you cou see, to see that you did not hurt anybody that was throwing th switch, did you?
A. Not just that minute I didn't.
Q. You were working the injector, you say?
A. Yes.
Q. You were up to within eight or ten feet of the switch wh the accident happened, weren't you?
A. Yes.
Q. And up to that time you had not looked out of the right your window at all to see whether you were going to hurt anybo did you?
A. From up to what time?
Q. Up to the time when you looked out and noticed the h jump?
A. Why, I looked out a great many times from the shop there.
Q. Yes, but after you passed this last switch, I mean?
A. No.
Q. You began to work your injector; you did not look out, y worked your injector, didn't you?
A. Yes.

Q. And you went right ahead, and the first you knew of anybody being in danger was when you saw this boy trying to swing on the engine?
A. Yes sir.
Q. Now when you said, "Don't do that," didn't you know
244 that at that place he was trying to get on was this two foot hole and there was danger of him going under the engine?
A. I didn't know there was a two foot hole, no.
Q. Did you know it was lower at the track at the place he was trying to get on?
A. Well, the ground is most generally lower than the track in all places.
Q. In this siding?
A. At all sidings.
Q. All over the yard?
A. It is lower than the track, yes sir.
Q. There is no place where the ground is equal with the ties at all?
A. Yes, a great many places.
Q. What do you mean, a great many places, it is or it is not?
A. It is.
Q. Was not the reason that you called out to this boy, "Don't jump," because you saw that the place he was trying to get on was a dangerous place?
A. No, sir.
Q. Because of this depression?
A. No, sir.
Q. Now you swore positively at the last trial that McKee turned this switch, didn't you, I-J?
A. No sir.
Q. Didn't you swear that McKee turned it?
A. No sir.
Q. Well, who did you say did turn it?
A. I said I didn't know who turned it.
Q. You did not know who turned it?
A. No sir.
Q. You swore that McKee turned the switch before you got to that one, didn't you, positively?
A. Yes.
Q. You saw him do that, you said?
A. Yes sir.
Q. Now had you ever run an engine up to this storehouse on this siding before?
A. I don't think I had until that day.
Q. It was the only time?
A. My first experience, yes sir.
245 Q. You knew this boy was only sixteen years old, didn't you?
A. I did not.
Q. You didn't know whether he was forty-five or not, I suppose?
A. Well, I didn't think he was forty-five.

Q. You knew he was a boy, didn't you?
A. I knew he was a boy, yes.
Q. You knew he was on your engine?
A. Yes, sir.
Q. You knew he would be apt to get off and throw switches, didn' you?

Mr. Hartpence: I object on the ground that the mental proces of this witness is not relevant.

Mr. Simpson: It is to show the care he used. Under this Feder Act the master is responsible for his negligence. I want to sho what care he used.

The Court: What is his testimony so far, that he did get off an throw switches or not?

By the Court:

Q. Did you see him throw any switches at all?
A. No, I did not.

By Mr. Simpson:

Q. You knew that some one would throw that switch at I-J, didn you?
A. Yes, I instructed Mr. McKee to do it.
Q. You knew he did not do it now?
A. I don't know whether he did or not.
Q. You heard him testify yesterday, that he, McKee, did it?
A. I know he testified, but he testified to a lot of things that wasn so.
Q. Oh, I see. You heard him testifying he did not throw th switch, didn't you?
A. Yes sir.

246 Q. You heard McKee testify that he saw Tonsellito com along the right side of the engine and pass you, throw th switch and walk back and disappear from his view on th right side of the engine, didn't you? You heard that?
A. I didn't hear it that way.
Q. All right, did you hear McKee testify yesterday that Mi did throw this switch at I-J; did you hear it?
A. I heard that.
Q. You did not see Mike throw this switch at I-J?
A. No sir.
Q. You were operating this engine?
A. Yes.
Q. And you knew that unless you kept looking out on the rig hand side of the engine you might run over somebody in the wa didn't you?
A. Well, there is not supposed to be anybody over there on th tracks.
Q. And is that the assumption that you acted on, that you d not have to look out?
A. No sir.

Q. That you could run the engine without looking out at all?
A. No sir.
Q. You did not look out, did you?
A. No, at that time, I did not, no.
Q. Where was the pilot, how far from this switch at I-J, when you looked out and saw this boy jump for the engine? How far was the head of the pilot?
A. When I stopped he was about from six to eight feet.
Q. When you looked out, I mean?
A. I did not look at the pilot; I looked at the boy. I don't know how far it was then.
Q. You don't know. You don't know where the pilot was at the time you looked out and saw the boy; don't know that now at all, do you?
A. Why, that is, I presume, after I stopped and looked, from about six to eight feet.
Q. Did you testify at the last trial: "Then I was proceeding very slowly to this switch in front and to about twenty feet—
247 from twenty to thirty feet from that switch, and I was busy working the injector, setting that off.
Q. What is the injector?
A. What you put the water in the boiler. Just got done with that and looked out the window and Tonsellito jumped for the engine and missed it and went under the front wheel of the tank." Did you so testify?
A. Yes.
Q. You did know at the last trial you were within twenty to thirty feet of the switch?
A. Yes, but I was moving all the while.
Q. You were only going about two miles an hour?
A. Yes; all right. You can go quite a ways in two or three feet?
Q. How far can you go in three feet?
A. Three foot.
Q. That is what you call quite a ways, is it?
A. Yes, quite a ways, isn't it?
Q. I don't think it is.
A. Well.
Q. Now you also testified: "Had your engine come to a standstill before that?" and you answered "No sir", didn't you?
A. Yes sir.
Q. And do you still say your engine was not stopped?
A. Yes sir.
Q. And that it did not move and stop again, as McKee testified?
A. Yes sir.
Q. You only stopped once?
A. That is all.
Q. Did you tell Tonsellito anything when he got on the engine?
A. No sir.
Q. Did not say a word to him?
A. Yes; I told him he need not go because McKee was going to throw the switches over there.

Q. After that he put coal on the fire?
A. Yes sir.
Q. You did not tell him to get off?
A. No sir.
Q. You told him he need not go because McKee was going t
throw the switches?
A. Yes sir.
Q. Was McKee on the engine then?
A. Not as I know of.
248 Q. How soon did you stop the engine after you saw hi
jump?
A. Oh, in about two or three seconds.
Q. Were you asked this question: "Did you stop your engine
A. I did. Q. How soon after you saw him jump," and did yo
answer, "Right on top of his foot."
A. Yes sir.
Q. Which wheel was it went over his foot?
A. Right front tank wheel.
Q. What do you mean, the front tank wheel—which wheel i
that from the front?
A. That is the right front wheel.
Q. Of the tank or of the locomotive? Is it the first wheel on th
locomotive, the second wheel or third wheel, or fourth wheel, o
the fifth wheel?
A. The right front tank wheel.
Q. What is that on the locomotive, how many wheels from th
front?
A. Why, it is the front wheel on the tank.
Q. How many is that on the locomotive? How many wheels o
the locomotive are in front of the front wheel on the tank?
The Court: In this particular engine?
A. Two, four, five wheels ahead of that on the engine.
Q. Then it was the sixth wheel that went over his foot?
A. Sixth wheel.
Q. Now what position was Tonsellito in when you got down t
help carry him?
A. He was laying on his side, on his right side.
Q. His foot under the wheel?
A. No, not then, because I backed the engine up.
Q. Did you back it up before you got down?
A. Yes sir.
Q. Then you backed the engine off of him before you got dow
off of the engine, did you?
A. Yes sir.
249 Q. How far back of him did you back?
A. Oh, I can't say—maybe a foot.
Q. A foot? The front of it was a foot behind him?
A. Yes, the wheel.
Q. The pilot?
A. No.
Q. Was that behind him?

A. No, the tank wheel.
Q. You did not move the locomotive all the way back?
A. No sir.
Q. Simply backed this wheel off his foot?
A. Yes.
Q. Who helped you pick him up to carry him?
A. Why, couple of ashpit laborers.
Q. What are their names?
A. Why, one is Frank Plotz, and I think the other is—I can't all you the other man's name.
Q. Both working for the company?
A. One is and the other is not.
Q. One is now and the other is not working for the company?
A. Yes.
Q. Now will you tell me what Tonsellito was doing on the engine his day when he was hurt if you told him you did not need him nd you did not want him; what was he doing on the engine?
A. Why, just merely put a little coal on the engine and sat down n the seat box, that is all.
Q. Just to sit down and sit on the seat box?
A. Yes.
Q. Did you look out to see if he was off of the engine throwing switches, at any time?
A. No, I did not have to when I was backing up.
Q. Did you look out? Did you look out?
A. No sir.
Q. Did you at any time look over to the left to see if he left his seat and if he was out in front of the engine throwing switches for you?
A. I did, yes sir.
Q. You did not see him, did you?
A. I did not see him, no sir.
250 Q. When did you make that observation? When did you look?
A. I did not see him when—I did not see him.

By the Court:

Q. When you looked and did not see him whereabouts on this road that you have taken was that?
A. Why, I did not see him at all off the engine.

By Mr. Simpson:

Q. No; but you told me that you did look for him off of the engine to see if he was throwing switches and did not see him.
A. I didn't understand your question.
Q. Did you look off at any time to see if he was off your engine throwing switches for you?
A. No sir.
Q. Did not look?
A. No, sir.
Q. Did not look to the left to see if he was still in his place, or did not look off to see if he was throwing switches?

A. No, sir.
Q. You did not see him at any time, then, from the time yo
went through that switch to the time you ran over him?
A. No, sir.
Q. You don't know now who threw this switch 1-J, do you?
A. Only from hearsay, of the two witnesses.
Q. What you saw yourself?
A. I don't know.
Q. What do you mean, the two witnesses—McKee, you mean
A. Yes.
Q. Who is the other one?
A. Michael.
Q. Those two?
A. Yes.
Q. Now did you throw any of these switches yourself?
A. I did, yes.
Q. How many?
A. One switch—throwed one switch twice.
Q. You throwed one switch twice?
A. Yes.
251 Q. That is all you did, is it?
A. Yes.
Q. Was Michael on the engine when you got off to throw tha
switch?
A. Yes.
Q. You stopped the engine and got off and threw it yoursel
with this boy on the engine sitting doing nothing?
A. Yes.
Q. You did not tell him to get off and throw it?
A. No, sir.
Q. Did you stop and get down and walk around and throw th
switch and come back again?
A. Yes.
Q. How many switches did you see McKee throw?
A. One.
Q. Did anybody besides your friend McKee or Mr. McKee, Mille
and yourself, throw any switches that you saw?
A. No, sir.
Q. You did not see any others thrown?
A. No, sir.
Q. When you got off the engine did you get off at the steps, th
end of the steps down from your cab?
A. What do you mean? When I picked up Michael?
Q. Yes.
A. Yes, sir.
Q. Where was he lying when you got off the steps?
A. Right under the steps.
Q. And the front of your pilot was seven feet from the switc
when you stopped?
A. About that.
Q. And you just backed up a foot to get the wheel off, so th

ıe front would be eight feet from the switch, in your judgment, hen you stopped?
A. About that, yes, sir.
Q. When you got off your steps at that cab, he was then, you ay, lying two feet behind the steps?
A. No; he was lying right under the steps.
Q. Right at the steps?
A. Yes, sir.
Q. Do you know what the distance is between the point where his air pipe bulges out and the switch I-J?
A. I do not.
252 Q. What was his condition when you picked him up?
A. Why, he was lying on his right side, that is all.
Q. As to his foot, what was his condition as to his left foot? Was his shoe smashed?
A. Yes, sir.
Q. Was he bleeding through the shoe?
A. I do not think he had his shoe on at that time.
Q. Think he was barefooted, do you?
A. I think the stocking was left there and the shoe was off.
Q. You mean the engine had cut the shoe off?
A. No; most generally in all cases like that the shoe is knocked right off.
Q. Was it in this case?
A. I can't say whether it was or not.
Q. Did you pick up the shoe?
A. No, sir.
Q. You don't know whether the shoe was on or off?
A. No.
Q. You don't know whether he was bleeding through the shoe or not?
A. Well, he might have been bleeding through the shoe, yes.
Q. What he might have been I am not interested. Did you see that he was bleeding through the shoe?
A. No, I did not. I got down and picked the man up and took the man to the roundhouse.
Q. Leave the engine right there?
A. Yes, sir.
Q. You went up and got the barrel of oil, did you?
A. Yes, sir.
Q. And came back with the barrel of oil and delivered it?
A. Yes.

By the Court:

Q. Ohr, how many switches do I understand you to say were thrown up to the time of the happening of the accident? Leaving out of consideration the switch at I-J, how many outside of that had been thrown?
A. Three—one twice.
253 Q. So that made four throws of the switches?
A. Yes.

Q. Who threw the first one?
A. Joe Miller.
Q. And the second one?
A. I did.
Q. Was that the one that you refer to as throwing twice?
A. Twice; backed through it and came through again.
Q. And the fourth throwing, which was the third switch, was by whom?
A. By McKee.

By Mr. Simpson:

Q. You said to me that McKee, who was produced as a witness by the defendant here, had told many things that were not true? What do you mean by that?
A. Why, he said he got on the engine at the tool car. I do not think he did.
Q. Well, if you do not think he did does that make it untrue when he says it, if you are not sure about it?
A. Yes. I did not see the man get on the engine.
Q. Where did you first see McKee?
A. When he was throwing that switch at No. 3.
Q. That is the first place you saw him?
A. Yes; after I told him to go over there and throw this switch.
Q. He was on the pilot when this boy was hurt?
A. He said so, yes.
Q. Did you see him?
A. You cannot see him.
Q. Well, when you got off the engine did you see him?
A. No, sir.
Q. You did not go to see if he was on the pilot?
A. No, sir.
Q. Did you see him around at all?
A. As he came around the side of the engine then.
Q. What?
A. I was around back there then when we picked him up.
Q. He was there then?
A. Yes, sir.
Q. McKee was there when you got down off the engine, wasn't he?
A. No, sir.
254 Q. When did he come there?
A. After we picked him up.
Q. How long after?
A. Oh, I can't tell you.
Q. Where did he come from?
A. Might have come from the front of that engine.
Q. He might have come?
A. Yes.
Q. You did not see where he come from?
A. No, sir.

Q. You are still working for the New York Central Railroad Comy, aren't you?
A. Yes, sir.
Q. What do you do?
A. Same position, as hostler.
Q. Same what?
A. Position as hostler.
Q. Do you have boys firing for you now?

Mr. Hartpence: I object to it as incompetent, irrelevant and imterial.
The Court: I do not see the competency of it.

Q. Now can you tell me with reference to the line of the siding, ere this engine was the last time you saw this boy before he was rt? At what point I mean, on the siding, was this engine, the t time you saw this boy before he was hurt?
A. He was not on the siding at all yet.
Q. Where were you?
A. Down by the shop.
Q. That is the last place you saw him?
A. Yes.
Q. You paid no further attention to him until you saw him mp for the engine.
A. No, sir.
Q. You were his superior, weren't you?
A. No, sir.
Q. He was under your orders?
A. No, sir.
Q. Not as hostler?
A. Not at that time on the job I was on.
Q. He was firing for you, wasn't he?
A. No, sir.
Q. He put coal on the fire, didn't he?
A. Of his own record.
Q. It made the engine go and it saved you from putting it on?
A. That might be true.
Q. You did not put it on?
A. I did not.
Q. What do you mean when you say he was not firing for you, you say he put coal on and the coal made the fire burn and the e made the water boil and the boiling water made steam and the am made the engine go, what do you mean by saying he was t firing for you?
A. He was not firing for me, but he was doing what he was doing his own accord.
Q. And you did not have to do it?
A. No, sir. I did not have to do it anyway, at no time.
Q. You did not do it, did you?
A. No.

Q. You did not say anything at the last trial about these fe shovelsful of coal he put on, did you?

Mr. Hartpence: I object to it as incompetent, irrelevant and i material.

Q. You swore at the last trial that you did not do anything exce put the hook on—I will withdraw that question. You swore at t last trial this boy did not do anything but put a hook and shovel and get on the engine?

A. I think I did.

Q. You did not say anything at the last trial about putting c on, did you?

Mr. Hartpence: I object to it as incompetent, irrelevant and i material.

Mr. Simpson: I want to show the interest. I want to show deliberately suppressed that testimony at the last trial.

The Court: I cannot see that it would go to that. He might have answered that question. (Interruption.)

Mr. Simpson: I think that is all. I won't hold him for this. will find this later and recall him later if I can.

256 BERT FUCHS, sworn.

Direct examination by Mr. Hartpence:

Q. What is your occupation, Mr. Fuchs?

A. Locomotive fireman.

Q. For whom do you work?

A. New York Central and Hudson River Railroad Company.

Q. How long have you been in that occupation?

A. Nine years in that occupation.

Q. Where do you work?

A. Granton.

Q. Are you familiar with this engine 3791 that has been te fied to?

A. Yes.

Q. Ever have anything to do with it?

A. Fired it.

Q. How often?

A. On several occasions.

Q. Have you seen it very often?

A. Yes, sir.

Q. How often?

A. Every day there down to the roundhouse—met it on the r

Q. What type of engine is it?

A. I—class type, according to the railroad class.

Q. Are there any other engines of that same class there at Gra yard?

A. 900's, 3900's and the 3800's is of the same class.

Q. How do they compare in size?

A. The engine 3700's and 3800's may be a foot or so longer

ıe 3900's, that is, within my judgment, but the tender on them ıgines, on the 3900 class is smaller, shorter.
Q. Shorter than the 3700 class?
A. Yes.

(No cross examination.)

57 EUGENE P. KRAEMER, recalled.

Direct examination by Mr. Hartpence:

Q. Mr. Kraemer, have you made any measurements, at my re-uest, of an engine of class 1, of the New York Central and Hudson ïver Railroad?
A. Why, yes.
Q. When did you do that?
A. I think I made those on—well, those were taken May 27th, his year.
Q. That was just about the time of the former trial, was it not?
A. Yes, sir.
Q. Did you make notes of your measurements at that time?
A. Yes, sir.
Q. Have you those notes with you?
A. Right here.
Q. Did you measure the engine accurately?
A. Yes, sir.
Q. Do your notes show the measurements accurately as taken?
A. Yes, sir.
Q. What engine did you measure?
A. Why, I had one engine number 3986 and another engine 906, which are class I engines.
Q. What is the measurement of the engine over all?
A. Why——
Q. Including the tender?
A. Including the tender? The first one is *the* 62 feet and the ther one is 62.8 feet.
Q. You mean 3986 was 62 feet?
A. Yes.
Q. And 3906 was 61.8?
A. Yes.
Q. What was the measurement of the engine 3986 from the pilot the place where it joins the tank?
A. That was 40 feet.
Q. What was the measurement of 3906 from those same points?
A. 40.3.

(No cross-examination.)

58 Dr. LOUIS POOLE, sworn.

Direct examination by Mr. Hartpence:

Q. Mr. Simpson, will you admit Dr. Poole's qualifications without y examining him?

Mr. Simpson: Oh, yes.

Q. Doctor, do you know Michael Tonsellito, the plaintiff in o
of these suits?
A. Yes, sir.
Q. How long have you known him?
A. Well, since the time when I first saw him on the day of t
accident.
Q. When did you first see him?
A. It was in June, 1912.
Q. Where did you see him?
A. In the operating room of the North Hudson Hospital.
Q. Did you operate on him?
A. No.
Q. Had he been operated upon when you first saw him?
A. Why, the operation was about half over, and they were und
going the operation when I went there.
Q. Who was performing the operation?
A. Dr. Fendrick.
Q. The doctor who testified here this morning?
A. Yes, sir.
Q. Did you examine Michael physically at that time?
A. Yes, sir.
Q. What sort of an examination did you make?
A. I examined the foot and examined the portion that had b
removed, the crushed portion, while he was on the table under
influence of ether.
Q. Did you remain until the operation was concluded?
A. No, not until it was entirely finished; I left before they sta
to sew the flap.
Q. Did you see him again after that?
A. Yes, sir.
Q. When?
A. Same afternoon.
259 Q. Do you recall what time it was when you saw
again?
A. Well, I left the hospital and came back again—it was on
two hours afterwards; I think it was between five and six o'cl
somewheres along there.
Q. Do you remember about what time it was when you first
him?
A. About three o'clock.
Q. Did you examine him in any way after the operation was
formed?
A. Why, he came under my service and he remained at the
pital over a month.
Q. Did you have charge of him during that time?
A. Yes.
Q. He was your patient?
A. I think I did most of the time, yes.

Q. Doctor Fendrick then simply performed the operation; is that ue?
A. Yes.
Q. Then you took charge of him after that?
A. Yes.
Q. Have you seen Michael since he left the hospital?
A. I have seen him a great many times since he left the hospital.
Q. Where have you seen him?
A. The greatest number of times I have seen him is when I passed im on the Boulevard driving an automobile.
Q. You have seen him driving an automobile?
A. Oh, yes, very often.
Q. Have you examined his left leg since he left the hospital?
A. I examined his leg here in the Court House here.
Q. Do you recall when that was?
A. I cannot recollect the date now, but it was just previous to the ist trial.
Q. And you examined him at that time for the purpose of testifyng, did you not, in that trial?
A. I did, yes, sir.
Q. What did you discover when you examined him?
A. Well, I discovered that he had a portion of the foot removed and that there was a scar there, and the scar being nade by what we call a plantar flap made from the sole of the foot eing drawn up, covering the wounded area and stitched on, and ad healed, leaving a stump, which we would consider to be part of he foot—posterior part of the foot.
Q. How much of the foot was actually removed?
A. Well, all of the portion of the foot that would be in front of he ankle.
Q. The heel remained intact?
A. The heel was intact, yes.
Q. Had you seen him after he left the hospital, left your charge t the hospital, until that time you examined him for the purpose f testifying, had you seen his foot or leg?
A. Oh, no.
Q. Did you examine the shoe that he wore at that time on his left oot?
A. I did.
Q. In your opinion is it a proper shoe?
A. Not the one he had on when I examined him, and I called his ttention to that and his father's attention to it.
Q. You saw his foot here in the court room yesterday?
A. Yes.
Q. You saw that portion on the front part which Dr. Arlitz said howed some evidences of irritation?
A. I saw the portion that evidently is rubbed against the front of he shoe, yes, sir.
Q. And the part that Dr. Arlitz pointed out as being indicative f an irritation?
A. Well, I do not think I would call it an irritation. It has be-

come pretty tough on the part there—callous—and I think it wo
be better for him to have a shoe made to not press on that. I
very easily done.

Q. What kind of a shoe could be made to do that?

A. Why, there is a shoe made by the people who ma
261 facture those things, in which the front of the shoe is m
of aluminum, covered with leather, and the back of the s
is the regular calfskin, and there is a little arrangement goes up
front, and the inside of the shoe is fitted with a rubber composi
to keep it shaped, and that long portion of the front of the wo
rests on—in fact, it does not rest on anything, the weight comes
the sole of the foot,—the sole of the heel, and all the forward
port is above the wound, resting on a pad behind the aluminum
front.

Q. Does it have any spring or elasticity to it?

A. Yes; the rubber composition in the front of the shoe giv
the same elasticity almost—it is very close to the natural.

Q. What would be the cost of such a shoe, do you know?

A. Well, I have heard of one case that cost thirty-five dolla
around thirty-five dollars.

Q. Never bought one yourself or paid for one?

A. Oh, no.

Q. In your opinion can Michael walk on his left limb without
necessity of any artificial apparatus?

A. He can walk on the stump as it is now without having a
ward spring—he cannot get that; but he can bear the weight o
body on it, without any trouble, the same as any man could wal
his heel, precisely, but he cannot get a forward spring.

Q. Could he walk in and out of the house?

A. A. Yes.

Q. If the left leg were cut off three inches further up than at
ent, could he walk upon that without the aid of artificial appara

A. Could not, no.

Q. At the time of the operation just what portion o
262 foot which had been removed did you examine?

A. Well, I should say that all of the foot in front o
median line—let me illustrate on my own foot—say from here
had been.

Q. What line did you designate that?

A. A middle line over the arch of the foot.

Q. What was its condition, do you remember?

A. Its general condition?

Q. The condition of a portion that you examined?

A. Oh, that was what we call comminuted—that is, it was no
but pulp, you might say.

By the Court:

Q. You are now referring to the portion which had bee
moved?

A. Yes.

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By Mr. Hartpence:

Q. Did you, Doctor, at any time after the operation was performed, talk with Michael?
A. Yes.
Q. About the accident?
A. I took a history of the case that same day, later on.
Q. What do you mean by a history of the case?
A. Well, what we call a history is the name, the address, and the relationship, and the age, nationality, previous accidents, general health, cause of the present accident, and so forth. That is a history.
Q. That is what you mean by history?
A. Yes.
Q. From whom did you procure that history?
A. From Michael.
Q. When was that?
A. On the same afternoon at the hospital, after he was down in the ward.
Q. Do you recall when that was, on which visit that you were at the hospital?
A. On the next visit to the hospital.
Q. What time of the day was it?
A. Well, as near as to my recollection, between five and six o'clock.
Q. Just what did you ask Michael at that time?
263 A. If you will allow me to refer to my notes I can tell you exactly what I asked him.
Q. Did you make notes of the history of the case that you procured from him?
A. I did, yes.
Q. Did you take down accurately what was said to you at that time?
A. I took it right down at the time.
Q. Have you that memorandum with you?
A. I have, yes.
Q. Well, what did you ask him?
A. I asked him his name.
Q. What did he tell you?
A. Michael Tonsellito.
Q. Ask him anything else?
A. Asked him his address.
Q. What did he tell you?
A. Said he lived at 647 Fifth Street, New Durham.
Q. Ask him anything else?
A. I asked him his age, and he said seventeen; and on account of him being a minor I asked for his father's name and mother's name.
Q. Have you his mother's name and father's name?
A. Told me his father's name was James, and his mother's name was Philomena. Said he was single.
Q. Ask him anything else?

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A. I asked him what he worked at, and he told me he was wiper and working for the New York Central at the Granton round house, and I asked him if he had any number, and he said n and then he said he was given Number 76, which I put down i the list "given Number." I asked him when it happened, and h said about half past twelve, and I asked him if he had any previou accident, and he told me in May 13, 1912, he was hurt by a hamme in the New Durham Machine shop and was attended afterwards b Dr. Hilford, of West New York.

Q. Ask him anything else?

A. Asked him how it happened, how this accident hap pened.

264 Q. What did he say to that?

A. He said "I turned a switch, and as the engine came jumped on, and I slipped and fell under the engine and the whe went over my foot."

Q. Since the last trial, Doctor, last spring, have you seen Micha running an automobile?

A. Oh, yes; I have talked to him while he was running it.

Q. Seen him repairing them or fixing them in any way?

A. I saw him one day fixing—bending over the hood workin on the engine of the car on the road.

Q. What kind of automobiles did he run when you saw him?

A. I don't know the make of them, but I have seen him dri different cars—touring cars.

Q. What do you mean by touring cars?

A. Well, a car with a tonneau on.

Q. More than one seat?

A. Four passenger or more.

Cross-examination by Mr. Simpson:

Q. You don't know whether he was helping or hurting the engi when he was leaning over the hood, do you?

A. Hurting it, did you say?

Q. Eh?

A. I do not, no.

Q. You simply saw this man bending over the hood of an au mobile engine, working at the engine?

A. Yes, but I don't know whether he was doing it any good doing it any harm.

Q. Don't know what his knowledge is about automobile engin

A. No.

Q. Were you trying to give us the impression that he was an exp automobile mechanic?

Mr. Hartpence: I object to it as incompetent, irrelevant a immaterial, as to what impression he was endeavoring to give.

Q. Now, Doctor, you are in the employ of the New York Cent Railroad Company, is that a fact?

265 A. Well, I am employed by them whenever I am sent

Q. And have been for how long a time?

Mr. Hartpence: I object. He has not finished the answer.
The Court: Finish it.

A. I am employed by them in this case, yes.
Q. You have been in lots of cases?
A. Yes.
Q. How long a time have you been employed there?
A. For probably fourteen—thirteen or fourteen years.
Q. You have a position up in the North Hudson Hospital, connected with it?
A. I am attending surgeon.
Q. Have been for how long a time?
A. Ever since the hospital has been in existence.
Q. And that is the place where—includes the district of Weehawken and Grantwood, where these yards are, that hospital, doesn't it?
A. It is the nearest hospital to that.
Q. So if a man is unfortunate enough to be hurt by the negligence of the New York Central, the first man whose hands he falls into is you, isn't it?

Mr. Hartpence: I object.
The Court: It may be stricken out.
Mr. Simpson: I think that shows interest in this case.
The Court: Not the way you put the question, Mr. Simpson.

Q. It is a fact that the first man into whose hands the injured man comes is you, isn't it, up in the hospital?
A. No, not necessarily.
Q. Well, there is a good chance of it, isn't there?
A. No.
Q. Now you testified in the last trial, didn't you?
A. I did, yes.
266 Q. You were asked this question: "Did Michael say anything to you at that time about the accident?" and you answered, did you not, "Not in the operating room, but afterwards, downstairs, I took his history, in bed, after he came out of—some time after he came out of the anæsthesia." You answered it that way, didn't you?
A. Yes; he was thoroughly out of——
Q. Did you so answer it, that is all I want to know, at the last trial?
A. Yes, sir.
Q. Did you so testify?
A. I answered that way, yes, that is right.
Q. Now, then, you were asked this question: you said, "after he came out of the—" then corrected it by saying "some time after." Did you think from your experience in court that it was dangerous to say that you took the statement after he came out of the ether without qualifying it by saying "some time after he came out of the ether?" That question was objected to and permitted before you answered, did you not: "The word after is sufficient. I took

the statement after the man came out of the ether." Did you answer that way?

A. Yes; it was after he came out of the ether.

Q. Then you were asked: "That was sufficient, wasn't it, just after?" And you answered "Yes," didn't you?

A. Yes, sir.

Q. Then you were asked: "Why did you correct it and say some time after he came out of the ether if your first statement after was sufficient?" You were asked that question, weren't you?

A. Yes.

Q. And did you answer: "Well, there is not any particular reason for that, excepting that I was trying to fix a time by the clock." Did you so testify?

A. I did, yes.

Q. You produced a little slip at the last trial, didn't you?

A. Yes.

267 Q. Was it the same slip that you produce now?

A. Yes.

Mr. Hartpence: That is not in evidence.

Q. Let me look at it?

Mr. Hartpence: It is not in evidence.

Mr. Simpson: I have a right to see it.

The Court: I don't know but what counsel has a right to see it.

Mr. Simpson: It may be a page of the Persian Bible.

Mr. Hartpence: He has no right to take it without my consent, but I consent to it. He may use it.

(Mr. Simpson examines paper.)

Mr. Simpson: I would like to offer this in evidence, if I may.

Mr. Hartpence: This witness is under cross examination.

Mr. Simpson: I would like to mark it for identification.

(Paper marked A for identification.)

Q. Would this man be able to run an automobile as well as he is able to walk around on this stump, as you say he is, without any artificial foot?

Mr. Hartpence: I object to it as not proper cross examination. I did not ask Dr. Poole anything about his ability to operate an automobile. I merely asked him where he had seen him. He said he had seen him running an automobile.

The Court: Then you asked him the class of car he ran. I will permit it.

Q. Would he be able to operate an automobile on this stump as well as he is able to walk around, that is, you say, as I understand you, that he is able to walk around now?

268 A. I did not say that he could walk perfectly natural, you know. I said he walks without the forward spring.

Q. But you did not say that at first. You said he could walk, he could support the weight of his body?

A. Yes.

Q. All right. Now you testified that he could walk on this stump. Now I ask you can he operate an automobile with this stump?
A. He could push a lever with that foot.
Q. Can he operate the automobile with this stump? He can or he cannot?
A. He cannot operate the entire automobile.
Q. But he can use it?
A. He can operate one lever that is used for the left foot.
Q. With this stump?
A. Yes; he can push against the lever and push it away from him just as well as if he had the full foot.
Q. And the fact he lost the front of the foot makes no difference at all in the utility of the foot as far as using it to operate the lever or a brake lever?
A. It doesn't make much difference, because lots of people use their heel, even though they have the foot.
Q. Now, then in operating an automobile a man must keep his foot on the clutch or on the brake, mustn't he?
A. Keep both feet on it.
Q. Isn't it a fact that the more careful drivers put a rubber pad on the pedal?
A. Yes.
Q. So that a man with a complete foot would not have his foot slip off?
A. Certainly.
Q. And you say then that this man with only a stump of his heel can operate the lever of an automobile clutch or brake, do you?
A. As far as the pushing forward motion is concerned, yes.
Q. How about keeping it on the lever; can he keep the end of the stump on the lever as completely as a man with a whole foot?
A. When he has a shoe on.
269 Q. Can he with the shoe on?
A. Yes, sir.
Q. And operating the automobile requires the use of both feet, does it?
A. Yes.
Q. It requires quickness in the use of the feet, doesn't it?
A. Well to be——
Q. To be on the alert with your feet—to think in your feet—it requires you to be on the alert with your feet?
A. Running an automobile requires a quick brain, and if your arms or legs act with the brain you may have to use them quickly.
Q. You have to use your feet quickly?
A. You may have to, yes.
Q. Is it true that this man has a tender stump, and which is due to a bad operation, and that the tender stump would give him pain, would he be able to operate an automobile, if he suddenly had a sudden pain in that stump?

Mr. Hartpence: I object to it on the ground that the hypothetical question assumes facts that are not proven in the case.

The Court: You are referring to that part that says bad operation?

Mr. Hartpence: Yes.

The Court: I will sustain the objection.

Q. So, if this man, by reason of the operation which was performed, has now a place on his foot which is able to give him pain with the same ability as a man who did not have pain in his feet, in operating an automobile?

A. If he had a tender point of irritation on the sole of his foot he certainly could not use it for that.

Q. Suppose he was putting the clutch out and got a pain in that stump and took it off the clutch, wouldn't the clutch be apt to go in again if he released his hold on it?

A. Why, if he took his foot off the clutch, the clutch would
270 go back again, naturally; it would not make any difference if he had thrown his gear into neutral he could go back if he wanted to.

Q. Do I understand in your opinion he has been really improved by this accident—he is better able to run this automobile than by his natural foot?

A. I have not said anything that makes you understand that.

By Mr. Hartpence:

Q. At the time you took the history of Michael, in your opinion as a physician and surgeon had he entirely come out of the ether?

A. Entirely, yes.

Q. Was he rational at the time he was talking to you?

A. Oh, yes.

Defendant rests.

Plaintiff's Testimony in Rebuttal.

Albert G. Beesy, sworn.

Direct examination by Mr. Simpson:

Q. What is your occupation, Mr. Beesy?

A. Superintendent of the North Hudson Hospital.

Q. Are records kept there of cases that come in in the usual routine of the operation of the hospital?

A. There are.

Q. Have you in your possession the record of the case of Michael Tonsellito, who was a patient in your hospital?

A. I have.

Q. Is the person now connected with the hospital who made the records, the nurse? She is not there?

A. They are not.

Q. Now will you produce the record of the North Hudson Hospital?

A. (Witness produces.)

Q. What is this card?

271 Mr. Hartpence: I object to the use of this memorandum.

Q. Will you turn to that part of the record which shows the time that Michael Tonsellito came out of the ether, if you please—that is the time I want to get.

A. I have not examined the record at all. I simply brought them.

Mr. Hartpence: I object to the use of the record in its present condition. It shows, if the Court please, that they were not kept by this man, but by some nurse who is not now in the employ of the North Hudson Hospital. I do not think that qualifies that to be used.

Mr. Simpson: That is what your Honor ruled the last time that the nurse was not there, we could prove the record.

Mr. Hartpence: Not unless the absence should be accounted for in some way other than that, or their handwriting should be proved, or the fact she is not longer at the hospital.

Q. Is this record you refer to, this writing, a portion of the record?

A. That is a portion of the record.

Q. Who would that be kept by in the routine of the office?

A. By some nurse who attends the patient.

Q. Is the nurse who kept the records now in the North Hudson Hospital?

A. As far as I know, no.

Mr. Simpson: Now I offer it.

Mr. Hartpence: I would like to cross examine.

Cross-examination by Mr. Hartpence:

Q. Who kept it?

A. I could not say as to that; I was not there at the time.

272 Q. You do not know who kept that record?

A. I could not say.

Q. Do not know whose writing it is?

A. I could not say, I do not know the handwriting.

Mr. Hartpence: That is all. I think it is inadmissible.

Redirect examination by Mr. Simpson:

Q. You have made an investigation to try and find out who wrote this?

A. Not the slightest.

Q. You do not know who wrote it?

A. I could not tell you.

Q. Do not know whether the nurse is there or not?

A. I know the nurse is not there.

Q. That made this?

A. Yes.

Mr. Simpson: I offer this record simply for the purpose of showing the time that this patient came out of the ether.

The Court: Is there anything, Mr. Simpson, up to this time, t sufficiently establish this is the record?

Mr. Simpson: This testimony of this witness. This is kept i the regular routine. I think if your Honor looks at Jones on Ev dence, I have laid a foundation to produce these papers. I hav produced the man in charge of the records—that it is a hospital— that records are kept, and he produces the record; and I do no know of any case which requires me to produce the person in whos handwriting they are kept. There are some cases on it. I thin I can find a New Jersey case if you will give me a minute.

Mr. Hartpence: The trouble is he doesn't know anything abou it; don't know who made it; might have been made up afterward and put with the records.

273 By the Court:

Q. When did that come into your possession?
A. When I assumed charge of the hospital.
Q. When was that?
A. June 16th, this year.
Q. Under what circumstances?
A. As part of the hospital records in general.
Q. You found these there?
A. I found them there with the other records in the case.
Q. They are the records of the case?
A. Yes, sir.
Q. Why did you say that?
A. Because we keep such records in regard to all cases admitted
Q. Have you had any experience at the North Hudson Hospit prior to the time you came?
A. No, sir.
Q. You have no personal or individual knowledge of these pa ticular records other than you found them there as reputed—pa of the reputed records?
A. Exactly.

Mr. Simpson: The case of State vs. Hinckley, holds: "Entri made merely by physicians in the wards are not conclusive eviden of the condition of the health, but may be explained."

Mr. Hartpence: I do not object to that, but my objection is th he has not produced such a record. I have no means of asc taining.

The Court: That does not go to the point, Mr. Simpson, as t proof that must be made as to records. The difficulty in my mi is whether this witness is competent to establish or identify t records, if they are the records.

Mr. Simpson: Of course it is simply cumulative, because the la who was superintendent then has testified to the fact itself.

The Court: I would have no very great difficulty if that pers were here and would say and identify these as the reco
274 which were kept in her possession; but I have difficulty seeing the force of the testimony of this witness, inasmu

as he did not become an officer of the hospital of proper capacity until after the time of these records.

Redirect examination by Mr. Simpson:

Q. When did you become an officer of the hospital?
A. June 16th, this year.
Q. At that time you found these among the regular records of the hospital?
A. I did not find it, but it must have been there.
Q. Where did you find it to-day?
A. I found it two weeks ago when I was subpœnaed before.
Q. At that time where did you find it?
A. With the other records.
Q. Of other cases in the cases?
A. All other cases in the hospital.
Q. It is the custom since you have been there to keep such records as this?
A. It has been the custom to keep all records filed away together.
Q. Giving the history of the case and time of the putting a man under an anæsthetic and the time of his coming out, and all of those details?
A. Yes, sir.
Q. And you found this one where when you looked for it?
A. Among the files of the records.

Mr. Simpson: I will offer them in evidence.
The Court: Well, the use you want to make of it is simply to read from it as to that one point?
Mr. Simpson: Yes, sir.
The Court: I am not willing now to admit it. We cannot close entirely to-night, because I am going to close at four o'clock. I am going to hold that point until to-morrow morning.
275 Mr. Simpson: I want to produce Miss Tully—I want to subpœna Miss Tully if your Honor is going to hold it, and have her here. I don't know whether the witness wants to take this book with him and come back again, or whether he wants to leave it and have me send it to him.
The Court: He can leave it in the custody of Mr. Kelley.

Q. Do you prefer to retain possession of it?
A. No; if I can leave it with you.
Q. All right, I will give it to Mr. Kelley, and you need not come back, and I will see that you get it.
A. All right.

FRANK PARAZZO sworn.

Direct examination by Mr. Simpson:

Q. Where do you live Frank?
A. West New York.
Q. Were you working for the New York Central Railroad?
A. Yes, sir.

Q. Did you come here to-day under subpœna from the defendant

Mr. Hartpence: I object.

Q. The defendant brought you here under subpœna?

Mr. Hartpence: I object to it as irrelevant, incompetent and im material.

A. Yes.

Mr. Simpson: I want to show they did not call him.

The Court: How can it be relevant?

276 Mr. Simpson: I think it is arguable to the jury.

Mr. Hartpence: I shall object to such argument.

The Court: I shall sustain the objection.

Q. You did work for the New York Central?

A. Yes.

Q. And have been in Court yesterday and to-day, haven't you

Mr. Hartpence: I object to it as incompetent, irrelevant and im material.

Q. You were in court to-day?

A. Yes, sir.

Q. And you appeared suddenly from the clouds and went on th witness stand?

Mr. Hartpence: I move that that portion of Mr. Simpson's re marks be stricken from the record.

Mr. Simpson: I will withdraw it.

Q. Now, Mr. Witness, were you working for the West Shore Ra road at the time of this accident?

A. Yes.

Q. Did you pick up this boy after he was hurt?

A. Yes, sir.

Q. See this picture, here, don't you?

A. Yes.

Q. Do you recognize this as a picture of the track and switch a the water pipe, the siding where you picked him up?

Mr. Hartpence: I object to it as leading. If this witness w testify what it is I will not object, but I will object to this as a le ing question.

The Court: I think it is objectionable.

Q. Will you point out on this photograph where this boy w lying when you picked him up. This is the switch——

277 Mr. Hartpence: I object to it on the ground that it is yet shown that this witness knows what the photograph is

The Court: Suppose you ask him if he knows what that pict is?

Q. Do you know what that is a picture of, Frank?

A. Well, that is a picture when I went past I see the man on the ground and I picked him up.

Q. Is that a picture of the place where you picked him up?

Mr. Hartpence: I object on the ground that he has not shown that he understood what it is.

Q. You know what this is a picture of, don't you? Look at that and study it over a little while and see if you don't know what that is a picture of?

(Witness examines picture.)

A. That is a picture, yes, but I don't know anything about—I know the track. I know I got the man. I pass——

Q. You know whether there is a curved water pipe on that track where you picked up the man, don't you?

Mr. Hartpence: I object to it as leading.

The Court: I am going to permit it this time.

Q. You know there is a water pipe comes out there?

A. Yes, a water pipe is here.

Q. You know there is a switch here?

A. Yes; I can see right here.

Q. Where was the man when you picked him up?

278 Mr. Hartpence: I object to this witness testifying from that picture. I do not object to his stating where it was in relation to the water pipe.

Mr. Simpson: I think he should be allowed.

The Court: I am not satisfied he recognized that and can identify that photograph.

Q. You know there is a water pipe and you know there is a switch, don't you?

A. Yes, there is a switch, yes.

Q. Where did you—without looking at the picture, tell where did you pick the man up, with reference to the water pipe and the switch?

A. On the ground.

Q. Where was he?

A. Right near to the switch.

Q. In the middle of the water pipe and the switch?

A. No, outside the track altogether.

Q. Outside the track?

A. Yes, sir; the track is right here and the man fell off to one side.

Q. I know he was not on the track, but where was he? Can you point out on this picture where he was when you picked him up?

Mr. Hartpence: I object, and I think it ought to be taken away from the witness.

The Court: Mr. Simpson, unless he can identify that photograph more particularly than he has I do not think he ought to testify.

Mr. Simpson: The photograph has been admitted by your Hono as a picture of the locus where this accident happened; it has bee used in the examination of every witness; it has been used by de fendant.

The Court: When they have expressed themselves as knowin and realizing that it was a photograph of that location and locus as you termed it. Now does this witness or does he not s
279 recognize it? If he says positively that he does, then ther cannot be any objection to his using it.

Q. What is this, Frank? What is this?
A. That is a railroad yard, that is all it is.
Q. What is it a picture of?
A. Yes.
Q. What is it a pictture of?
A. I don't know.
Q. Is it a picture of the Granton yard?

Mr. Hartpence: I object to any further use of the photograph.

A. I don't know nothing about this Granton. At one o'clock I went back to work; it was dinner time.
Q. You picked him up?
A. He was down on the ground.
Q. Was he near a switch?
A. Who, me?
Q. No; the boy when he was lying down.

Mr. Hartpence: I object.

A. I don't know. He was at—one one side, that is all. He was on the side of the track.

The Court: One minute. There has been an objection to the question, and the objection is sustained because the objection is that it is a leading question. Therefore the answer may be stricken out.

Q. You picked the boy up, didn't you?
A. Yes, when I was passing, yes, sir.
Q. How far away from the rail was he?
A. I cannot tell. I don't know nothing about how long he is—I can't tell.
Q. You were talking to me down there?
A. Yes, I was passing.
Q. I was showing that picture to you?
A. Yes, sir.
Q. Didn't you point out to me on this picture and show me—

Mr. Hartpence: I object.

280 Q. Wait a moment. I want to put this question, under the case of State vs. Kysilka. Didn't you point out to me on this picture five minutes ago a spot between the curved water pip and the switch and say that you picked this boy up between the curved water pipe and the switch, five minutes ago?

Mr. Hartpence: I object to it as incompetent, irrelevant and immaterial, and framed for the purpose of prejudicing and biasing the jury, and I move for the withdrawal of a juror.

Mr. Simpson: I refer to the case of State vs. Kysilka, and say that case holds that that is a perfectly proper question,—if your honor should look at the case of State vs. Kysilka. I have a right to show, when I am surprised by the witness, that the witness at an anterior time made a statement to me, for the purpose, as the Court of Errors says, of wiping the slate clean, because when I call a witness, and he falls down and does not testify, then the effect on the jury is that he don't know, and I have a right to, under the case of State vs. Kysilka, to show that he has made that kind of a statement before, for the purpose of wiping the slate. I think it is in 85th Atlantic, or 86.

(The Court examines book.)

The Court: Well, this seems to go entirely to the discretion of the Court. The Court of Errors warns the trial judge that he is to use his best discretion in permitting it.

Mr. Simpson: It is purely a matter of discretion, but it is not an improper discretion.

The Court: Well, I will sustain the objection, inasmuch as from the testimony of this witness the court up to the present time has very grave doubt as to whether he recognizes the locality that is portrayed by this very photograph that you are now asking him about.

Mr. Simpson: All right, sir.

The Court: That may have been the situation for all I know at the time he made the answer to your question. I will sustain the objection.

Adjourned to October 15, 1914.

OCTOBER 15, 1914.

Mr. Simpson: Dr. Poole has a slip I want to offer in evidence. It was marked for identification yesterday, and I want to offer it in evidence, if he is here.

Mr. Hartpence: He will be here.

Mr. Simpson: We will wait. I ask the privilege of asking a question on cross-examination that I overlooked in the heat of the trial of the man that gave the measurements of the locomotive. I will call Mr. Kraemer.

EUGENE P. KRAEMER, recalled.

Further cross-examination by Mr. Simpson:

Q. Mr. Kraemer, when you gave us the measurement of the locomotives yesterday did you give us the measure of the locomotive from the pilot to the step of the engine opposite the cab?

A. Why, no; I gave it to the division between the tender and the engine itself.

Q. Well, where is the step on this engine?

A. The step is about two feet more towards the pilot.

Q. Than the division line?

A. Than the division line.
Q. How far over the rail does the engine project?
A. Now I have some maps over there that will show.
Q. Can you tell us how wide the engine is?

The Court: Over all?

Q. Yes; over all?
A. I really could not tell you until I look on my map. I have my measurements given there.
Q. You did not have your maps yesterday when you told them about the length of the engine?
A. No; I took those measurements of the length of the engine at the time of the last trial. Now the other measurements were taken about a month before I made that survey.
Q. Do you mean to tell us that you can give us the length, but cannot give us the width of the engine?
A. I can give you the width of the engine if you allow me to get my map.
Q. That is over there?
A. Which I have over there.
Q. Certainly. I thought you meant they were in New York.
A. I have my maps. (Maps handed to witness.) It is about nine feet ten and a half.
Q. Well, how far over the rail—how much of that width would be between the rail and the end of the tie—that is, outside of the rail, exclusive of the rail, how much of that edge would project over the rail on the side?
A. Why, there is a few varying width here.
Q. Take the step. I am only concerned about the step?
A. As far as the step?
Q. Where the step is how much would it project over the rail?
A. At the bottom of the step it projects two feet eight inches beyond the rail.
Q. Beyond the rail; that is all I want.

283 Redirect examination by Mr. Hartpence:

Q. How far, Mr. Kraemer, back of the point of the center between the engine and the tank is the step on the tank—the front step of the tank?
A. Let's see; I don't know as I have got that question just right.
Q. I understood you to say that the measurement you gave yesterday of the length of the engine ran from the front of the pilot to a point midway between the step, the near step of the engine and the front step of the tank. Was that correct?
A. No. What I consider as the length of the engine was from the pilot to the division line between the engine and the tender.
Q. That is exactly what I put to you in different words.
A. Yes, sir.
Q. Now from that point to which you gave the measurement yesterday, what is the distance from that point midway between

igine and the tender to the front step on the tender, approxiately?

A. Why, it is about two feet.

Q. So that it is about two feet from that point toward the pilot the step on the engine and about two feet further away to the step n the tender?

A. Yes, sir.

Recross-examination by Mr. Simpson:

Q. What is the distinction between the step on the tender and the tep on the engine? What is the distinction? Are there two steps, ne at the cab and one behind the cab?

A. As far as I know there are.

Q. Well, are you clear about that in your own mind?

A. Yes, I am pretty sure about it.

Q. Is there anything on the map which shows the two steps?

A. No; the map just shows the section through the engine.

Q. Does not show the steps?

A. It shows the section of the steps.

284 Q. Only one set of steps?

A. Those are the steps on the engine.

Q. On the engine?

A. Yes.

Q. They simply have two steps nearest from the pilot or furthest from the pilot?

A. Furthest from the pilot. Shows the section of the steps between the tender and the engine.

Q. And there is another set of steps nearer the pilot?

A. There are a few of the other steps right near the pilot.

Q. Near the pilot?

A. Right on the pilot.

Q. What was the steps used for, ascending the cab?

A. These are the steps on the end of the engine.

Q. And these are two feet from the rear, the dividing line from the engine and tender?

A. Yes, sir.

Q. And between the pilot and the dividing line?

A. Yes, sir.

Redirect examination by Mr. Hartpence:

Q. If the Court please, I should like to have permission to ask Mr. Kraemer a question that I overlooked when I had him on direct examination, if I may, with regard to a standard plan of the New York Central and Hudson River Railroad in the construction of yard sidings. Is there a standard plan, Mr. Kraemer?

A. Yes.

Q. Can you state what the distance would be or is on that standard plan on yard sidings, from a line even with the top of the rail down to the roadbed on the side at a point about four feet out from the rail?

A. Why, for an eighty-pound rail, which they have out in N Durham, that distance is seventeen and one-eighth inches.

Q. Is that according to the standard plan?

A. Yes according to New York Central standards.

285 Recross-examination by Mr. Simpson:

Q. Seventeen and one-eighth inches, what is that? What is t seventeen and one-eighth inches?

A. Seventeen and one-eighth inches is the distance from a l level with the top of rail down to the ground.

Q. Yes, but how far away from the rail?

A. Four feet out from the rail.

Q. Four feet from the rail?

A. Yes.

Q. Well, that provides that for a shoulder of that four feet widt There is a shoulder of four feet in between the rail and where t line begins to descend then?

A. No; there is a real shoulder, for the grade is somewhat furt out than that.

Q. Than the four feet?

A. Yes.

Q. Where is the descent? The descent begins four feet from rail?

A. No, sir.

Q. Where does that begin—how far from the rail?

A. The descent begins about five and five feet eight inches fr the rail.

Q. Five feet eight inches? What I want to get in my mind, that is what I do not understand, does this standard plan pro for a level space right out from the rail for five feet before ther a descent of this one foot seventeen inches?

A. No; would not be a space of five feet; it would be a spac about—of about a foot and eight inches will be level.

Q. Then it will begin to descend?

A. Then it will descend.

Q. Does that descend all at once in a straight line or in a slope

A. No; it will descend in a slope, a slope of one and a to one.

Q. What does that mean?

A. That means it descends one foot for every distance of a and a half out.

Q. Where would you get this one foot seventeen inches, how from the rail then?

A. I did not have one foot seventeen inches.

286 Q. What did you have?

A. Seventeen and one-eighth inches.

Q. Where would you get seventeen and one-eighth inches?

A. It would start from a point four feet out from the rail continue level for about a foot and eight inches.

Q. And then begin to go down?

A. Then begin to go down.

Q. When it got as far as it went it would be then seventeen inches from the top of rail; that is, the complete depth would be seventeen inches?

A. Yes, for that level stretch.

Q. The rail would never be higher than seventeen inches above the solid ground?

A. No, sir.

Redirect examination by Mr. Hartpence:

Q. You do not mean solid ground where the fill is?

A. No; I mean for that level stretch.

Q. From what point of the rail, how far out?

A. Starting at four feet out.

Recross-examination by Mr. Simpson:

Q. You mean four feet out from the rail, that is—using this picture here which shows a track—you recognize that as a picture of a railway track?

A. Yes.

Q. Take this rail, how far out would you come from this rail before you got your seventeen inches drop?

A. Would come out four feet.

Q. Then you would get your seventeen inches and drop?

A. In the time I would have my seventeen inches drop.

Q. You would have begun to make your fall how far from the rail? I mean it would be level with the rail for how far and then begin to descend?

A. There is no place it would be level with the rail.

Q. I mean level with the ties, with the roadbed, with the dirt under the rails?

287 A. The ties are placed somewhat above the ballast, I don't know just how much distance, just a few inches above when it gets to the end of the tie, and probably half the tie is exposed. Now at four feet out they start taking the measurements, and at that time the ground is a small level stretch, which is seventeen inches below the top of the rail.

Q. But that four feet that comes from the rail to that point is a gradual slope from the rail, isn't it?

A. Yes, sir.

Q. Sort of a shoulder?

A. A gradual slope from the ties, rather.

Q. From the ties, yes. That is it would not permit of such a condition as you see indicated on the picture here, if this is a correct picture, of a straight drop from this tie of two feet?

A. No, is should not be.

Mr. Simpson: Mr. O'Connor, I want to ask you a question.

MARTIN F. O'CONNOR, recalled.

Direct examination by Mr. Simpson:

Q. During the time that Tonsellito was employed by you and particularly the day of the accident, did you have some system of time sheets that were returned to the company, on which time sheet his occupation was given as an engine wiper or an engine man, or whatever he was?

A. We had just his time card.

Q. Would that time card have on it his designation, as to whether he was an extra man or what he was?

A. Well, his name and number, and his occupation, what he was doing.

Q. Where is the card for the day of this accident?

A. Why, I suppose it is in the master mechanic's office.

288 Q. In Weehawken?

A. In Granton—I could not say positively it is there.

Q. In the routine it would be returned there?

A. That is where it is turned in.

Q. That card would have his occupation on it for that day?

A. Yes, it should.

Mr. Hartpence: I move to strike out the testimony as irrelevant, immaterial and not proper rebuttal.

Mr. Simpson: I object on the ground he should have objected to the question. It is too late, to let the testimony in to see whether it benefits him, and then move to strike it out.

Mr. Hartpence: I could not tell what it was.

Mr. Simpson: You could tell by my questions, and it certainly—I cannot put my finger on the case, but there is a case in this state that you cannot wait until the question is answered and then ask to have it stricken out. You must object promptly. They hold that in criminal cases.

The Court: I will overrule the objection at this time.

(No cross examination.)

MICHAEL TONSELLITO, recalled.

Direct examination by Mr. Simpson:

Q. Michael, you remember being taken to the hospital, don't you?

A. Yes.

Q. Did they take you into a room and give you something that made you go to sleep?

A. Yes.

Q. What was the next thing you remembered after that? When did you come to yourself, to know where you were and realize where you were?

289 Mr. Hartpence: I object to it as incompetent, irrelevant and immaterial, and not proper rebuttal.

The Court: I think the objection is well founded in that you have not called the witness' attention to the testimony of Dr. Poole, and have allowed him, if he could, to verify or refute that directly.

Mr. Simpson: Well, I will withdraw it.

Q. Dr. Poole said that on the afternoon of the day that you were injured he had a long conversation with you, in which he got the name of your father and your mother and how you said the accident occurred. Do you remember any such conversation with him?
A. No, sir.

Mr. Hartpence: I object to it as not proper.
The Court: The witness says he don't remember.

Q. Do you remember being put under ether in the hospital?
A. Yes.
Q. Do you remember what time you came out of the ether and knew what was going on?

Mr. Hartpence: I object.
The Court: That is the same question. The present question, in my judgment, is objectionable.
Mr. Simpson: I ask to have an objection. That's all.
Mr. Simpson: Now Dr. Poole took that paper. I would like that paper before I close my case, because I think it is very important.

290 Mr. Hartpence: Dr. Poole was expected to be here at ten o'clock, and I think he is apt to come in almost at any moment. Still, when Mr. Simpson offers the paper I shall object to its admission. It was a paper that was not produced by him.

Mr. Simpson: The paper was used by him to refresh his memory, a paper in his handwriting, and it is a paper that distinctly contradicts him, because it says three o'clock this interview took place, and I claim now that when it goes to the jury this demonstrates this boy was under the ether until five o'clock, and Dr. Poole has written down the time of the interview he said he had, and it is right out of his own mouth. Couldn't I come in and prove Dr. Poole had said to somebody something that contradicts his statement? Why, he has written something down. He has used a paper to refresh his memory. It is in his own handwriting, and I want to put it in for the purpose of contradicting him.
Mr. Hartpence: If Mr. Simpson's object is to show the time indicated on the slip I have no objection.
Mr. Simpson: That is all.
Mr. Hartpence: If it is offered as Mr. Simpson's offer, then I desire to have the opportunity of cross examining Dr. Poole upon the questions that he desires to offer it for, because at that moment, I take it, if the court please, that Dr. Poole becomes his witness.
The Court: Of course.
Mr. Hartpence: I have no objection.
The Court: Have you any other witness?
Mr. Simpson: Miss Tully I subpæned, and I expect her momentarily, on this hospital report, but she is not here now. There is

291 not anything else that I think I want; in fact I would not ask your Honor to wait for her if I could put this paper in, because that is what I want to get in evidence.

Mr. Hartpence: Is this the same paper, Mr. Simpson, which Mi
Tully proved at the former trial?

Mr. Simpson: Yes; this is the one she used. This is the one.

The Court: Does that bear the mark of an exhibit? Did she si
ply use it to refresh her memory?

Mr. Simpson: I think she used it to refresh her memory.

Mr. Hartpence: It can be proved—I only desire to object to t
proper proof.

The Court: The paper should be formally proved that it was
record, that is all.

Mr. Hartpence: If this is the paper that Miss Tully used at t
former trial, and Mr. Simpson seems to want to introduce it for t
purpose of showing what it says about the time Michael Tonsell
came out of the ether, then I am perfectly willing to have it.

Mr. Simpson: That is all I want.

The Court: Could you not, Mr. Hartpence, by an inspection of
satisfy yourself that it is such a paper?

Mr. Hartpence? Yes. What is it, Mr. Simpson?

Mr. Simpson: Here—"time out of ether."

Mr. Hartpence: Put those two items in. I will consent they go
as the memorandum from the bedside notes, I think they call the

The Court: Suppose you make your stipulation or consent so t
the stenographer gets it?

Mr. Hartpence: It is consented by the defendant that so much
the record shown by the bedside notes in the case of Mich
292 Tonsellito in the North Hudson Hospital be admitted
showing the following memoranda: "Out of operating ro
3.40 P. M.; out of ether at 5 P. M."

The Court: May not the statement go upon the record also t
that record you refer to is the same record that was offered
counsel for the plaintiff on the former trial?

Mr. Simpson: I will state that this is the paper, to the best of
recollection, that was produced by Miss Tully under subpœna fr
me at the last trial, and used by her to refresh her memory.
recollection is it was not offered in evidence as an exhibit.

The Court: My further suggestion was that it also be shown u
the record that this is the same record that you offered yesterday u
the proof attempted to be made through the present superintend
of the hospital.

Mr. Simpson: This is the paper which was produced yesterday
the superintendent of the North Hudson Hospital, and attempte
be proved by me through him.

The Court: That is all right. That cleans the record.

The Court: Mr. Hartpence wants the privilege of cross exami
Dr. Poole, as he now becomes your witness.

Mr. Simpson: I do not think he is my witness. It was a p
he used in his direct testimony, and I question him on direct ex
nation, and he produced it and used it and testified from it
want to offer the paper in evidence. I do not understand——

The Court: Very well, you are making that paper y

293 Mr. Simpson: The paper, yes.

The Court: He may have something regarding that paper that explains it on cross examination.

Mr. Hartpence: I have a right to have that explanation, because I have only questioned him as to portions of it. I understand that this concludes his rebuttal, subject to the right to put in the statement of Dr. Poole, and I should like to call a witness in the nature of re-rebuttal to introduce a photograph in evidence by the person who took it.

The Court: Is there any objection?

Mr. Simpson: None at all.

The Court: With the understanding that that closes your case, with the exception of that testimony.

Mr. Simpson: Unless it opens it up. That is my case, and I——

The Court: That is, your rebuttal will be closed with the testimony of Dr. Poole?

Mr. Simpson: Yes.

Now, gentlemen, you can keep this in proper sequence, because Dr. Poole is now here.

Dr. Louis Poole, recalled.

Mr. Simpson: I just want the paper. I do not need him to go on the stand. I offer the paper. I offer this paper in evidence especially for the purpose of proving the time here, which is either 2 or 3 P. M.; I don't know what it is, but it is for the jury to say. That is what I want the paper for. Those few words in here, "Time, date and place of examination. North Hudson Hospital—time 2 or 3 P. M., or whatever it is there. It has been altered.

294 Mr. Hartpence: I have no objection to the paper being offered in evidence, with the right to interrogate Dr. Poole.

The Court: You have that right.

(Paper marked Exhibit P-4.)

Cross-examination by Mr. Hartpence:

Q. Doctor, I show you memorandum on Exhibit P-4, which you used yesterday in testifying to refresh your memory; I call your attention to an item on that paper, "Date and place of examination, June 23—12 N. H. Hosp., time 2—there is a 3 written over it—P. M., and ask you what that entry means?

A. Operation——

Mr. Simpson: I object to it on the ground that the entry speaks for itself.

Mr. Hartpence: I will withdraw it.

Q. What examination does that refer to?

A. An examination of the foot—physical examination.

Q. Does it refer to any other examination?

Mr. Simpson: I object on the ground that the paper speaks for itself. He cannot modify it; it is for the jury to say what the paper means.

The Court: Mr. Simpson, you recall that the Doctor's testimony is that he was at the hospital while the operation was under way, and I think that was also testified to by the operating surgeon, and that as I recall the testimony he was there at a subsequent time the same day.

Mr. Simpson: Yes.

The Court: It seems to me that would be a perfect explanation if the Doctor says that was the time he examined his foot, which he has indicated.

Mr Hartpence: My other question was merely to make it more certain.

295 The Court: Your first question seems to have answered the purposes any question could answer.

Mr. Hartpence: That is all.

Redirect examination by Mr. Simpson:

Q. Who altered this and made a 3 out of a 2 on this?

A. I was going to put down 2.50 or 2.40, something like that but I got into the operating room before three o'clock and I left at three.

Q. You knew what time you got in when you wrote this paper didn't you?

A. Well, approximately.

Q. Didn't you change this paper since the last trial, because at the last trial you testified that you made this examination of the man at a time when it was subsequently developed you could not have made it, because he was under ether.

Mr. Hartpence: I object on the ground that it assumes a state of facts that is not in the case at all.

The Court: I will sustain the objection.

Q. What was the condition of his foot when you examined it?

A. The crushed portion had been removed, had just been removed, when I got there.

Q. You examined it after the operation was all over——did you?

A. No; the operation was about half over.

Q. Why, Dr. Fendrick was doing this operation, wasn't he?

A. Yes, sir.

Q. Was not your operation?

A. Well, I was sent for originally in the case, and I was not home, you know, and as soon as I—I got to the hospital as soon as I could.

Q. It was not your operation, was it?

A. It was not my operation.

296 Q. You did not get paid for this operation, did you?

A. No, I did not.

Q. Dr. Fendrick was the West Shore or the New York Central surgeon doing this operating work for them, wasn't he?

A. Well, he was doing it for me.

Q. Doing it for you?

A. Yes, sir.
Q. You mean you are the first superior in the New York Central service?
A. I was sent for originally, and being an emergency case was taken to the hospital. I was not in at the time the call came, and as the case needed immediate attention Dr. Fendrick went ahead and operated, and by the time I got there the operation was about half over. I was in the operating room about twenty-five minutes.
Q. Did you write this paper all at once?
A. That was written all at that time, yes.
Q. At the same time, eh?
A. Yes.
Q. Well, was that written at the time you examined the foot?
A. The——
Q. Was this paper written at the time you examined the foot?
A. That part in relation to the foot and diagram on the back was written in the operating room.
Q. Could you now say the time when you changed this 2 to a 3?
A. Right in the operating room.
Q. What time was it?
A. Just at three o'clock.
Q. Did you take out your watch and look?
A. I looked at the clock in the operating room.
Q. Did you look at the clock before you made the figure 2?
A. No, I did not.
Q. Oh, you didn't? So you made the figure 2 and then looked up at the clock and then saw it was three and then you put a three over it?
A. Yes, sir.
Q. Always do that when you write figures, first write the figure, when you are concerned about the time, then look at the
297 clock and see it is wrong and change the figure?

Mr. Hartpence: I object, if the purpose of the question is to discredit the Doctor, it seems to me the classical situation of discrediting his own witness intervenes.

Mr. Simpson: I am not discrediting my own witness.
The Court: I will admit it, the Doctor can probably answer it.

Q. Can you answer the question?
A. Do I always do it? No; I don't always do it.
Q. Did you write this with a fountain pen or with pen and ink in the hospital?
A. With a fountain pen.
Q. Your own fountain pen?
A. My own fountain pen.
Q. You testified at the last trial, didn't you?
A. Yes.
Q. You used this paper in the last trial, didn't you?
A. Yes.
Q. You did not say anything at the last trial about this 3 P. M.

referring to the examination of the foot and not to the rest of the paper, did you?

Mr. Hartpence: I object to it as incompetent, irrelevant and immaterial, as to whether he said anything about it. He may not even have been asked about it.

The Court: I will sustain the objection.

Q. You used the paper, didn't you?
A. I did. Exactly as it is there now.

298 HARAM A. ROBINS, sworn:

Mr. Hartpence: If the Court please, I shall ask the indulgence of the Court to have Mr. Robbins sworn in my direct case, for the purpose of proving a photograph of engine 3791, merely for completeness sake, if the Court will indulge me to that extent.

The Court: What have you to say about that?

Mr. Simpson: I haven't any objection.

The Court: All right. I do not see that it can in any way affect the situation by having it come now in place of its regular order.

Mr. Simpson: I haven't any objection.

Direct examination by Mr. Hartpence:

Q. Mr. Robbins, what is your occupation?
A. Photographer, from New York City.
Q. How long have you been a photographer?
A. About seven years and a half.
Q. Did you make a photograph—I show you a photograph and ask you if you have ever seen that before?
A. I have, yes, sir.
Q. What is it?
A. View of steps on engine 3791, taken June 23, 1912.
Q. Do you know where you took it?
A. I do, yes, sir.
Q. Where?
A. That was taken just a little north of switch 1-J.
Q. 1-J what?
A. Which is shown on map of the blue print.
Q. Was that in the Granton yard?
A. That was in the Granton yard.
Q. Of the New York Central and Hudson River?
A. Yes, sir.
Q. And is this 3791 of the New York Central and Hudson River Railroad?
A. It is, yes.

Mr. Hartpence: I will offer it.

Mr. Simpson: I have no objection to it.

299 Q. When was it made?
A. It was made June 23, 1912.
(Photograph marked Exhibit D- .)

Cross-examination by Mr. Simpson:

Q. Where was the locomotive when this was taken?
A. That was taken north of the switch I-J.
Q. This side of the switch?
A. The engine was pulled up just above this bank, right straight
n this bank.
Q. This was on the track?
A. It was on the track.
Q. This train on the track?
A. Yes.
Q. Why didn't you take it down and have the——
A. What's that? We wanted to show the view of the steps.
Q. The accident happened on the other side of I-J?
A. That is on the side.
Q. Why didn't you take it down there and have it taken?
A. Because I was making a photograph of the steps.
Q. Didn't you really want this nice looking roadbed to show?
A. The roadbed was taken to show.
Q. There is a pretty roadbed; isn't that the reason you had it
aken there?
A. Oh, no, just for the steps.

Redirect examination by Mr. Hartpence:

Q. Now, Mr. Robbins, I show you another photograph and ask
ou what that is?

Mr. Simpson: I object to his putting it in after my cross examina-
ion.
Mr. Hartpence: This is re-direct.

A. This is a photograph taken June 23, 1912, view of steps of Engine 3791 at the point of accident.
300 Q. You took that photograph?
A. I did, yes.
Q. Is that the same engine 3791?
A. That is the same engine, 3791.

Mr. Hartpence: I offer it.
(Photograph marked Exhibit D-7.)

Recross-examination by Mr. Simpson:

Q. How far from this 1-J was this taken?
A. From 1-J?
Q. Yes, how far from this switch?
A. That was taken about somewheres around there.

Mr. Hartpence: Indicating what?

Q. Put your finger on it?
A. About midway.
Q. Where it is marked C-D?
A. Yes, sir.

Q. All right. You did not have it taken between the curved water pipe and the switch, did you? You haven't any photograph in other words, of this engine between this curved water pipe and 1-J, have you?

A. No, sir.

Q. Who was the man that gave you the instructions to take those?

Mr. Hartpence: I object.

A. From the claim department of the New York Central.

The Court: That is not material.

Mr. Hartpence: It doesn't make any difference.

Q. Why didn't you make a picture of the whole locomotive?

Mr. Hartpence: I object to it as incompetent, irrelevant and immaterial as to why he did not.

Mr. Simpson: I will withdraw it.

Q. Well, did you make a photograph of the whole locomotive at the same time you made this photograph?

A. No, sir.

301 Q. These are the only pictures you took; is that right?

A. On June 23rd?

Q. Well, at any time, in reference to this accident?

A. Yes; I made other photographs.

Q. You did make other photographs?

A. Yes, sir.

Q. What were they?

A. The view looking south of the switch I-J.

Q. Anything else?

A. Yes, a view of the engine at point of accident, looking north toward 1-J.

Q. The whole of it?

A. No, the steps.

Q. Part of it?

A. Part of the engine.

Q. Anything else?

A. Not that I can recall at present.

Q. How is your memory, pretty good?

A. Sometimes.

Q. Sometimes not? All right. That's all.

Mr. Hartpence: Want the photograph to go in?

Mr. Simpson: I am not conducting your case.

Mr. Hartpence: If you want it to go in?

Mr. Simpson: I have no desire, except to present to the jury my own case. You can do as you like about your photograph.

Mr. Hartpence: Mr. Robbins, take the stand again, please.

Redirect examination by Mr. Hartpence:

Q. I show you another photograph and ask you if that is the photograph that you referred to, looking north at the switch 1-J, in Mr. Simpson's cross examination?

A. Yes.
Q. Did you take that?
A. I did, yes.

Mr. Hartpence: I will offer that.
(Photograph marked D-8.)
Mr. Simpson: No objection to it.

02 Recross-examination by Mr. Simpson:

Q. When was that taken, Mr. Robbins?
A. That was taken April 15, 1914.
Q. You say looking—that is looking up north to show this curved ater pipe and the switch?
A. And the point of accident.

Mr. Simpson: I ask to have "point of accident" stricken out.

Q. You don't know? You were not there when the accident hap-ened?
A. Except it was pointed out to me.
Q. You were not there?
A. No.
Q. Where is this? How far is this from the water pipe?
A. I have not measured it.

Mr. Hartpence: I object. This witness is not qualified as a per-on who can testify as to distances.

Mr. Simpson: He took the picture. I want to know how far he ook it from this water pipe. He, of course, is not a surveyor, but e must know when he told you he took this picture. He testified hat you asked him. You asked him what the distance was from he extreme left hand side.

Q. Where did your camera stand, how far from the switch, when ou took this picture?
A. I did not measure it.
Q. You did not measure it? Are you a professional photographer?
A. That is my line of work.
Q. Do you work for this company?
A. I do, yes.

Both sides rest.

303 *Motion to Direct a Verdict.*

Mr. Hartpence: If the court please, the motion is for direction of verdict in favor of defendant in this case, primarily with regard to the suit of the father, on the ground that under the Federal Stat-ute under which this action is brought there is no provision for the recovery of damages by the father except in the case of death, and that the Federal Statute supersedes entirely all state regulations and rules, and that therefore the verdict should be directed in favor of the defendant as to the father, upon that point.

As to the suit of both the father and the infant son, a verdict

should be directed upon the ground that the plaintiff has failed to e
tablish by sufficient proofs to warrant the case going to the jury th
negligence of the defendant upon the points and in the respects com
plained of, namely, the negligence of the defendant in constructin
and maintaining a defective roadbed, and secondly, the negligenc
of the defendant through its agents and servants in starting the en
gine in a way as to cause the injury to the infant plaintiff.

Further, upon the ground that the infant plaintiff was—and i
this respect the right of the father I take it is based upon the righ
of the infant—was a mere volunteer at the time the accident oc
curred, doing work which he was not required to do in the perform
ance of his duty, and at a time when his noon hour of recreation ha
come and when he was not obliged to do what he was doing as far a
the master himself is concerned, and that being true, he cannot b
said to have been engaged in interstate commerce at the time of h
accident in the meaning of the Federal Act, and unless he was
engaged in interstate commerce, even though the defenda
304 itself was engaged in interstate commerce, the right to rec
very does not exist.

On the further ground that taking the evidence of the plaint
most strongly against himself, as we have the right to do in th
motion, the place where the plaintiff Michael Tonsellito attempted
board the engine was at a place where the ground was at least t
feet below the level of the roadbed, where some excavation had be
made for the purpose of taking care of the air pipe apparatus and
a point where he himself said he had to reach up this time in or
to reach the handles of the engine, and that under those circu
stances, this boy, being a boy of about sixteen or seventeen years
age, is of fair intelligence, and having been employed at this pl
for about a year and a half, and being upon his own testimo
thoroughly familiar with it, the situation, if dangerous, as is clai
by the plaintiff, was perfectly obvious and must be taken to h
been perfectly obvious to him as a matter of law, and therefore
assumed the risk; and that the testimony on that point is so cl
so undisputed, as far as the plaintiff himself is concerned, that th
is really nothing for the jury to consider in that respect.

Upon the point, further, of the moving of the engine, the t
mony of the plaintiff stands unsupported. There is a witness We
who was away across the yard eating his lunch, who said he saw
engine come up and stop, and start and stop suddenly——

Mr. Simpson: So does McKee say that.

Mr. Hartpence: But I am coming to all of that. And he wa
the other side of the engine and he had no way of te
305 what took place. Had no way of telling it. McKee, who
on the pilot, said that the engine came to a stop with
switch and then started and stopped, but he did not see what
place. He does not know whether it was at that moment, b
Michael got on, that the engine was started by the engineer an
was thrown. So there is no evidence at all as to what actually
pened there—direct evidence—except that of Michael, the
tiff, and opposed to that is the testimony of Ohr, the engine

who told just what happened there; how he saw Michael jumping while the engine was in motion, and that he called to him not to jump, that it was too late, that he immediately stopped his engine. That, standing by itself, of course, would perhaps leave it—the testimony of Michael on the one hand and the testimony of Ohr on the other, with the contrariety of facts that Michael himself on three different occasions after that told three different people that that is just exactly the way the thing happened. He told Dr. Poole at a time when Dr. Poole said he was perfectly rational, and in the evidence it is shown he must have been, and he could not have given Dr. Poole any other information. He admitted to Miss Tully while he was in the hospital, I think four or five days later, that that is just the way the thing happened, that he jumped from this moving engine and missed it and went under; and then several days after that he told Quackenbush the same thing in his conversation, which was reported verbatim by Mulcox, who was here and testified to that effect.

So that it seems to me, if the court please, on both ques-
306 tions, that the plaintiff has failed to sustain that burden of proof which is to establish the negligence of the defendant—not merely by the weight of evidence, but by the inevitable result—to such an extent that this court should direct a verdict on those facts in favor of the defendant.

And upon the further ground that it does seem to me that in the light of the testimony as it stands any verdict to the contrary must of necessity be set aside. Upon those grounds I move for the direction of a verdict.

And upon the final ground that it does not affirmatively appear that Michael Tonsellito, generally speaking, not merely upon the amplification of the question of the volunteer—the question of his being a volunteer, but on the general question that it does not affirmatively appear that at the time of Michael's injury he was engaged in interstate commerce within the meaning of the Federal Statute under which these actions are brought.

For that reason also the verdict should be directed in favor of the defendant or the case dismissed because of the non-jurisdiction of the court.

The Court: I will decline to direct a verdict upon the grounds urged, to which I suppose you desire your objection to be entered?

Mr. Hartpence: Yes, I object to it.

307 *Court's Charge to Jury.*

Gentlemen of the Jury:

You are actually trying two cases, one is that of Michael Tonsellito, who sues by next friend, and who is the party who it is alleged received the injuries, who is a minor and has not been emancipated, as we call it in law. The other is the suit by the father of Michael Tonsellito, both causes of action arising out of and depending for their support on the same allegation of negligence directed

to the defendant in the cause. The controlling action, so to speak, i that of the son, because if he is not entitled to a verdict at you hands then the father cannot recover. For that reason, we will con sider the action or suit by the son Michael Tonsellito first, becaus what I may say as to that will in a very large measure, and excep where I will otherwise denote to you, be a guide for you in determin ing the case of the father.

The action is brought under an Act of Congress entitled, "A Act relating to the liability of common carriers by railroad to thei employees in certain cases," which original act was approved Apri 22nd, 1908, and the amendment thereof of April 5, 1910. I wil read to you at this particular time the first section of that act, so tha you may know somewhat of the law which is being invoked in orde to maintain the action. It is in the following language:

"That every common carrier by railroad, while engaging in com merce between any of the several states or territories or between an of the states and territories, or between the District of Columbia an any of the states or territories, and any foreign nation or nation shall be liable in damages to any person suffering injury while h is employed by such carrier in such commerce, or in case of the deat of such employee, to his or her personal representative, for th
308 benefit of the surviving widow or husband and children o such employee, and if none, then of such employee's parent and if none, then of the next of kin dependent upon such employe for such injury or death resulting in whole or in part from the negli gence of any of the officers, agents or employees of such carrie or by reason of defect or insufficiency due to its negligence in i cars, engines, appliances, machinery, track, roadbed, works, boat wharves or other equipment."

The negligence of the defendant company or of the servant o servants of the defendant company, and that such negligence was th proximate cause of the injury complained of, must be shown b the plaintiff. The burden is upon the plaintiff to satisfy you o this by a fair preponderance of the evidence.

Now the plaintiff alleges that the injuries of which he complain are the proximate result of negligence of the defendant company that negligence consisting in this—and I am now about to rea to you from the fourth paragraph of the plaintiff's complaint i the action of Michael Tonsellito by next friend against the defend ant company, and that paragraph reads as follows:

"The negligence of the defendant aforesaid consisted in thi that it did not use reasonable care to have its roadbed in a sa condition, but on the contrary, the roadbed at the place where th plaintiff was injured was so unskillfully and improperly laid an graded that the said roadbed was below the ties of the railway trac on which there was a certain locomotive upon which the plaintif was engaged, and the plaintiff, who was a minor, of the ag
309 of sixteen years, had not been properly warned and instructe by the defendant in certain hidden dangers connected wit the said track and roadbed, which were not obvious to him by re son of his youth and inexperience, which defect has been before d

cribed in the caring thereof, which produced a condition which was difficult and dangerous, although not obvious to a person of the inexperience and youth of the plaintiff, when mounting upon locomotives at such place, and the plaintiff, while so engaged in the service of the defendant, attempted to mount said locomotive, by reason of the negligence of the defendant aforesaid, and by reason of the further negligence of the person in charge of the said locomotive, who did not give the plaintiff a reasonable opportunity to board the same, but started the said locomotive in motion, the plaintiff fell from the locomotive, and by reason thereof his left foot was cut and mashed so that he lost the same."

Before placing before you any of the items of fact which will claim your attention and require your determination, it is necessary that you should know what the legal duty of the defendant is to an employee acting within the scope of his employment.

First, the duty of the hostler, Ohr, who you will remember as one of the witnesses in this action, a servant of the defendant company, and acting for the defendant, was to exercise reasonable care in the propulsion and movement of the locomotive, that is, such care as under the circumstances was and amounted to reasonable care.

Second, the duty of the defendant company as to its roadbed and track was that it was bound to observe ordinary and rea-
310 sonable care to so construct its tracks and roadbed that they would be reasonably safe for its employees, and also it was the duty of the defendant company to use reasonable care to keep such tracks and roadbed in such condition. The defendant is only bound to use reasonable and ordinary care to make its tracks safe for the uses to which they are put, and the company does not insure the condition. There is no guarantee of absolute safety under all circumstances. Ordinary care does not require that every possible contingency must be anticipated and guarded against, but only such contingencies as are likely to occur. What is reasonable care in furnishing employees with a safe track depends upon the surroundings and the dangers to be fairly apprehended and encountered in the use of the track. Although the master fails in his duty to provide a reasonably safe track and roadbed he will not be liable for injuries sustained by an employee unless the defect resulting from his negligence was the proximate cause of the injury. Those are the duties of the defendant generally stated, and such as are due to an employee acting within the lines of his employment.

Now the plaintiff alleges that he was acting within the lines of his empoyment, and the defendant, through its agent Ohr, did not exercise that reasonable care for his, the plaintiff's safety, which under the circumstances it was his legal duty to use.

Now as to the allegations of negligence in the construction and maintenance of track and roadbed, the defendant has produced testimony intended to show that the tracks and readbed in question were constructed and maintained in accordance with a standard
311 used and employed by the railroads in the locality and under like conditions; but the plaintiff says that even if that be so, yet at the point where he alleges the accident took place,

there esisted a condition which presented a danger to and made the place an unsafe on- for the defendant's employees, and that the defendant was negligent in causing the condition and permitting it to remain, and that the reasonable care required by law was not exercised by the defendant in so constructing or permitting the condition to continue; and furthermore, that the danger presented thereby was and is such a one as reasonable care on the part of the defendant would have reasonably made known to the defendant the danger that would reasonably arise therefrom.

Now the plain question is this: Has the plaintiff satisfied you by a fair preponderance of the evidence that the defendant's servant Ohr was negligent in that he did not exercise reasonable care for the safety of the plaintiff, and that because of such failure to so exercise reasonable care the accident happened, or has the plaintiff satisfied you by a fair preponderance of the evidence that the defendant did not use reasonable care in the construction or maintenance of its tracks and roadbed, and that because of that failure the accident happened. If you have not been so satisfied the plaintiff cannot recover. If you have been so satisfied upon either or both of these grounds of alleged negligence, then you will find yourselves called upon to determine another question, and the duty is again upon the plaintiff to establish it and satisfy you of it by a clear preponderance of the evidence, and that question is, was the plaintiff acting within the scope of his employment. The plaintiff alleges that he was. The defendant alleges that he was not, but was a mere volunteer, that what he did or undertook to do on that engine was
no part of his work or duty, and that he was not ordered or
312 directed to do so or to perform such work by any person having authority to so direct. If that is so, he was a volunteer, and cannot recover.

Upon that point our courts have said:

"Where the servant is injured while attempting of his own volition and without direction so to do, to perform work which is outside of the scope of his employment, the master is not liable therefor, because of failure to instruct him as to the dangers incident to such work."

The master cannot reasonably anticipate the dangers incident to such work. The master cannot reasonably anticipate the servant will attempt something which is outside of his employment and which he is under no obligation to do, hence, no duty to warn or instruct as to the dangers of the work exist. If, however, a master directs the servant to perform the work outside of the scope of his employment, he is under the same obligation to warn and instruct him as to the dangers incident thereto, as though the work were within the servant's regular employment.

The burden, as I have before said to you, upon that point is also upon the plaintiff to satisfy you by a fair preponderance of the evidence that the work that he was engaged in or alleges he was engaged in at the time of the happening of the accident, was such work as was, under those rules which I have just read you, within the lines of his employment.

If you find that the plaintiff was acting within the scope of his ployment, then another contested fact presents itself. The plain- alleges that the accident happened at a point indicated by him in the photographic exhibits slightly north of a bend or loop 3 in an air pipe. That position you will find and satisfy yourselves as to from the markings that were made by the intiff's witnesses on the photographic exhibits.

The defendant alleges that it happened at a point several feet ith of this point. Your determination upon this point may be of siderable importance in the determination of the case.

If you should find that the defendant was guilty of negligence constructing and maintaining or in constructing or maintaining tracks and roadbed at one given point, and as a matter of fact accident did not happen at that point, but at another where such gligence did not, as a matter of fact, exist, then, you see, the negli- ce at the first point would not be the proximate cause of the in- y. In other words, for you to come to a proper determination on the question of whether or not, upon that score, the defend- was negligent or not, it may be absolutely necessary for you be positively sure of the place of the happening of the accident. w, that, gentlemen, is a matter of fact for you to determine from evidence. I cannot guide you any further in that than to call o your attention, so that you will have it before you in the con- eration of the case. And the burden, in that case, also, is upon plaintiff to have satisfied you of the place of the happening of accident by a fair preponderance of the evidence.

Now, again, if the plaintiff has satisfied you upon all of the- nts that I have already called your attention to, by a fair pre- derance of the evidence, and that he is entitled to recover, you e yet another item to deal with and decide favorably to him be- e he can recover, and that is, was the proximate cause of the ac- ent produced or did it grow out of a risk which he assumed.

Upon that our courts have said these things:

"It is a general and well settled rule of law that the law imposes no duty upon a master to warn or instruct the em- yee as to the dangers which are patent to persons or ordinary lligence.

One who assumes to do work which exposes him to obvious and wn dangers takes the risk.

The servant takes the usual risk of an employment in a business h which he is familiar, and it is not necessary, in such a case, to him what the dangers of the employment are.

If the master knows that the employment is dangerous, or ought now it, and also knows that the servant is inexperienced in the loyment, and has no knowledge of the dangers incident thereto, s his duty to warn the servant as to the dangers and instruct him void them."

Upon the same point our Court of Errors and Appeals has said: To relieve the master from liability for injury due to his failure warn an employee of danger, the danger, and not simply the

physical conditions out of which it arises, must be known and obvi-
ous to the employee."

In the Gila Valley Railroad Company vs. Paul, Justice Pitney,
reading the opinion for the United States Supreme Court, upon the
same point, says this:

"An employee assumes the risk of dangers normally incident to
the occupation in which he voluntarily engages, so far as these are
not attributable to the employer's negligence. But the employee has
a right to assume that his employer has exercised proper
315 care with respect to providing a safe place of work, and suit-
able and safe appliances for the work, and is not to be treated
as assuming the risk arising from a defect that is attributable to the
employer's negligence, until the employee becomes aware of such
defect, or unless it is so plainly observable that he may be presumed
to have known of it. Moreover, in order to charge an employee with
the assumption of a risk attributable to a defect due to the em-
ployer's negligence, it must appear not only that he knew or is
presumed to have known of the defect, but that he knew it en-
dangered his safety, or else such danger must have been so obvious
that an ordinarily prudent person under the circumstances would
have appreciated it."

Now the plaintiff in this action, as I have before stated to you,
is a minor, that is a person under the age of twenty-one years. He
says he will be twenty years of age on November 5, 1914, making
him about seventeen years and seven months old at the time of the
accident. His father testifies that the boy will be nineteen years old
on October 17, 1914, which would have made him sixteen years and
eight months of age at the time of the accident. This same rule of
assumption of risk as applied to such a person has been spoken of
and given to us by the courts of our state in this manner, and in
this language:

"Obvious risk with respect to dangers in the employment which
are known to the master or would be known to him by the exercise
of reasonable care, with which the minor servant, because of his
immature judgment and inexperience cannot reasonably be
316 expected to know and appreciate, it is the duty of the master
to explain to the minor servant fully the hazards and dangers
connected with the business, and instruct him how to avoid them."

And again:

"Where a minor servant is employed at a dangerous work, the
risks and hazards of which are not by reason of his youth and in-
experience so obvious that he can fully appreciate them, it is the
duty of the master to explain to such servant the dangers of such
service, and to instruct him how to avoid them."

Under and after applying the rules, considering the age, ex-
perience and intelligence of the plaintiff, his ability to discern, know
and appreciate danger, and considering the circumstances out of
and under which the dangers arose, it is for you to determine
whether or not this plaintiff is chargeable with an assumption of
the risks of that employment in which he says he was engaged. If
you find that he is so chargeable, then he cannot recover.

Now if you find that the evidence as applied to the several rules of law that I have given you, warrants you in finding for the plaintiff, then you may find for him such sum of money as will compensate him for the following items of damage or loss:

First, That which will compensate him for the pain and suffering, both mental and physical, that he has suffered, or, as you may find from the evidence, and as that evidence may direct you, he may now be suffering or may suffer in the future, because of the injuries which it may be shown to you he has received and
317 which are the proximate result of the casualty of which he complains. That is one item that may go to make up a verdict, if your verdict is to be for the plaintiff.

Secondly, he is entitled to be compensated for that loss which you may find he will meet with because of the inability to earn or of a lessened ability to earn, arising from and being the proximate result of the injuries which may have been shown and have satisfied you to have been the proximate result of the happenings complained of. That loss that I am just speaking of the plaintiff Michael Tonsellito will be entitled to, if entitled to at all, from the time he becomes twenty-one years of age. There is nothing in the case to indicate to the contrary that he has not as yet been emancipated, and as there is nothing in the case to so indicate and show, if you find for him at all, and upon that item, your finding will be only from the time when he becomes twenty-one years of age, and that, gentlemen, will be what is known in the law as a capital fund, because, by your verdict, if he is entitled to a verdict upon that score, you will be now compensating him for the loss with which he will meet in the future, and therefore the sum which you will find for that purpose should be for a lesser sum than his total or aggregate loss, in other words it should be the present worth of what that aggregate loss will be.

Now that brings us to another point which I have not previously touched on, because it is more fitting that it should come to your attention at this time, and in the consideration of any verdict which you may find that the plaintiff is entitled to, and that is the question of contributory negligence upon his part.

There is a duty which the law likewise imposes upon a person in the position of this plaintiff Michael Tonsellito, and that is,
318 that he must use that care which a reasonably prudent person would use in caring for his own safety, and if he does not, and is negligent and that negligence contributes to the happening of which he complains, he is then in law said to be guilty of contributory negligence. The burden of establishing that to your satisfaction is upon the defendant.

In this case if you have been satisfied in that manner, that the plaintiff Michael Tonsellito was guilty of contributory negligence, and that negligence contributed to the injuries which he received, then, if you have been so satisfied, you must determine to what extent such negligence on his part contributed to his injury and the damage resulting from such injury, and deduct such sum from what your verdict would have been had he not been negligent; that is, if you conclude from the evidence that he was guilty of contributory negligence, you must determine also to what degree that con-

tributed to the injury and to his loss, and to whatever degree you find that to be you are to deduct that sum from any other sum in the shape of a verdict which you otherwise would give him. So much for the case of Michael Tonsellito.

As I said to you in the opening, gentlemen of the jury, if you find that Michael Tonsellito, under the evidence and under the rules of law which I have given you, cannot recover, of course then your verdict will be for the defendant company and likewise will be your verdict in favor of the defendant company in the case of the father because, if Michael cannot recover, then his father cannot recover.

If, however, you find that your verdict should be for Michael, then you may find for the father.

The father is entitled to the services of the son until such time as the son arrives at his majority, or twenty-one years of age
319 unless the father has earlier released the son from that obligation, or, as we say in law, unless the father has earlier that that in the son's life emancipated him and set him free and given him the benefit of his own earnings.

Now, as I said to you before, there is nothing in this case which shows that the son has been emancipated, so that, for the purpose of this case, it will be considered that he has not been emancipated and that the father, therefore, in law, would be entitled to his service until the time when he becomes twenty-one years of age, or to the value of those services.

Therefore, if because of these injuries, and *which* you find there are the result of negligence of the defendant company, the father meets with a loss, or is not put in that position or left in that position where he has the benefit of the son's services, or, what we commonly mean, will not have the benefit of the dollar and cent return for that service, then he is entitled to have at your hands whatever you find that loss will be. Of course, gentlemen of the jury, that will be estimated only from the time of the happening of the accident, that is from June 23, 1912, until the boy arrives at the age of twenty-one years.

Now in estimating your damages upon that score for the father, as well as in estimating any damage for the loss that you may find that Michael will sustain, after he becomes twenty-one years of age, you are to deal with probabilities. You are to take into consideration the uncertainty of life. Michael may not live until he arrives at the age of twenty-one years. Arriving at the age of twenty-one years he may be stricken with an illness which would incapacitate him entirely from work of any character. He might meet with misfortune of another char-cter. All of these things which are probabilities you are to take into consideration in arriving at your verdict.

320 I think this, gentlemen, is the first service that you have performed since you have been brought to your present jury service this term, so therefore I must say to you this much more, that you are to depend upon your own recollection of what the testimony is, you are to depend upon your recollection of what was spoken upon the witness stand by the several witnesses, you are not to take recital of any of that testimony upon the part of the court nor upon

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the part of counsel, but you are to depend, as I said to you, upon your recollection of what the testimony was. It is your duty to determine by the exercise of your good judgment what of all of that testimony are the facts—is the truth; those facts and that truth as you find them, by the exercise of that good judgment, become what is called the evidence in the case, and it is that evidence as you will find it, applied to the rules of law applicable, that is to bring you and will bring you to a proper and legal determination as to what your verdict shall be in each of these cases.

Now, I am asked to charge upon the part of the plaintiff, as follows:—

Mr. Simpson: I think your Honor has covered all my charges.

The Court: You are satisfied without any further?

Mr. Simpson: Yes, you have covered everything.

The Court: You have noted then, Mr. Kelley, that the requests to charge as presented by the plaintiff, the plaintiff's counsel states have been fully covered in my charge.

Mr. Simpson: That is it, but I wanted to speak to your Honor a minute.

(Side bar discussion.)

The Court: Upon the matter of contributory negligence, gentlemen, in addition to what I have said to you upon that score, and in view of the fact that the plaintiff in the action is a minor, or was a minor, being at the age of either sixteen or seventeen years or thereabouts at the time of the happening of the accident, I want to say further to you that he is of that age where the courts of our state have said he was sui juris, but you may, in determining the question of contributory negligence to be charged to him or not to be charged to him, consider his age, his ability to discern, and his mental ability. You have had him before you on the witness stand, and therefore you are in a position to judge of that. He is, however, of that age where the courts of our state have said that he would be sui juris.

Now, with that, Mr. Simpson, does that cover it?

Mr. Simpson: Yes.

The Court: Therefore I am absolved from the duty of charging anything else?

Mr. Simpson: Everything I have asked you to charge you charged.

The Court: Upon the part of the defendant I have several requests, the first of which I decline to charge in the language in which the request is presented to me, or in any other manner other than as I have already charged upon that subject and in the language in which I have charged upon that subject.

The second request I will treat in a like manner.

The third request is this:

"If the jury believe that the condition of the defendant's roadbed at the time and place of the alleged injury to plaintiff Michael Tonsellito occurred (even though defective in the sense of the statute under which this action is brought, which of

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course is denied by defendant) was as plain and obvious to the sai plaintiff as to the defendant and its agents, then plaintiff must b taken to have assumed the risks of his employment in this respec and cannot recover against the defendant on that phase of this a tion."

I will not charge you in that language, but I will charge in th language that if the danger arising from that condition was obviou to the plaintiff then he would be charged with the assumption of th risk. Otherwise I will decline it.

The fourth request is:

"Unless the jury find as a fact that the defendant was negligen in the manner alleged in the complaint, then there can be no r covery by plaintiffs against defendant in this action; and the bu den is upon the plaintiffs to make out and establish such negligenc by the greater weight of the evidence."

I so charge you.

Fifth: "If the jury find that the defendant was negligent as a leged in the complaint, then they must also take into considerati whether the plaintiff, Michael Tonsellito, was guilty of contrib tory negligence, and if so, the negligence of each must be compare and weighed by the jury, and the verdict against the defenda diminished in the proportion that said plaintiff's negligence bea to the negligence of the defendant.

I so charge you, in addition to what I have already charged yo upon that subject.

Sixth: "A license to drive a motor vehicle may be issued by th Commissioner of Motor Vehicles of the State of New Jerse
323 only upon said Commissioner or his agent having first e amined said person and being satisfied of his ability as a operator, which examination shall include a test of the knowled on the part of the said person of such portions of the mechanis of motor vehicles as is necessary, in order to insure the safe operati of a vehicle of the kind or kinds indicated by the applicant, an the said applicant having demonstrated his ability to operate vehicle of the class designated; and the said Commissioner of Mot Vehicles, may, in his discretion refuse to grant a license to dri motor vehicles to any person who shall, in the estimation of the sa Commissioner, be an improper person to be granted such license; an this may be taken into consideration in determining the effect the injury to the plaintiff Michael Tonsellito upon his physi ability or disability to earn a livelihood and upon his earning c pacity."

I so charge you, in connection with what I may have alread charged you upon the same subject.

Seventh: I am also asked to invoke the directions or privileg accorded under section 70 of the Practice Act of 1912, by aski you, gentlemen of the jury, at the time of returning your verdic to answer this question:

"At what point do you find, as a matter of fact, the plainti Michael Tonsellito, attempted to board the engine at the time of t occurrence of the injury complained of?" Do you understand th

question? So that in addition to any other verdicts which you may render, you will also hand up your answer to that question.

That is all, gentlemen, and you may retire.

Defendant's Exceptions.

Mr. Hartpence: I desire to enter an exception to your Hon-
324 or's charge in that portion wherein you charged the jury if they find a verdict for Michael Tonsellito then they may find a verdict for the father. I have in mind, of course, the points raised upon my motion to direct.

The Court: Yes.

Mr. Hartpence: I desire an exception to your Honor's refusal to charge defendant's requests one and two, except as already charged, in the language as requested and modified by substituting the word "danger," and so forth.

The Court: All right.

The jury returned to the court room for further instructions.

Foreman of the Jury: I would like to know how we can place where this accident occurred—say the spot between the pipe and switch; whether we have to have that exact spot, or just merely the part of it.

The Court: You want to know how you are going to designate in answer to the question that the court put to you, the location that you will find was the location of the happening.

A Juryman: In feet?

The Court: Not in feet—I suppose you would be unable, because there is probably nothing in feet that you could measure. I don't know how I can advise you, gentlemen, except you might possibly use—this is only a suggestion on my part—you might possibly use as a point from which to determine or fix the spot, the loop in the air pipe, which is a well-defined and well-designated point now in the case. Now, how exactly you will be able — find it I am unable to say. You may be able to take that loop in the pipe, which I say is a well-defined point in the case, and designate it with reference to that: that is, north of it, or at it, or south of it; and it may be pos-
sible, if you can recall the testimony, to be able to give under
325 certain conditions the distance from that point with reference to the testimony that was given by the engineer regarding the different sections on that blue print map. You will probably recall he gave you the distance from a certain point. Whether that was the pipe I do not remember now, or from the switch 1-J. He gave you the distance of each cross section he made. So that you may be able to fix the spot from that, or you may be able to fix it by reference to the cross sections marked on that map, or by reference to the switch.

A Juryman: Your Honor, can we fix distance—for instance we can say five foot this side of a certain point, within that radius?

The Court: Yes, if you find anything upon which you can fix it, anything at all that will as nearly as possible fix it. It is very difficult for me to tell you, because I don't know what your minds are—

I have no right to, either. Anything you can fix it from, whether that map or anything else.

326 EXHIBIT P-4.

(*Dr. Poole's Certificate.*)

Memo. for Examining Physician's Report.

W. Shore Co.

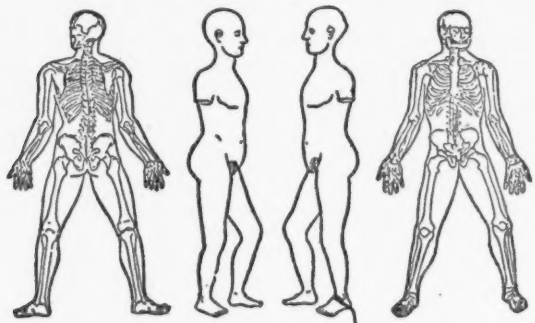
Case No. —.

Name in Full: Michael Tonsellito.
Residence: 647 5th st. N. Durham.
Previous Residence: —.
Name of Husband: —.
Father, James.
Mother, Philomena.
Married, Single, S.
Widowed, Divorced.
Number of Children: —.
Age: 17.
Weight: —.
Height: — Ft. — In.
Color of Hair: Br.
Complexion: —.
Sex: M.
Nativity: U. S.
Time in U. S.: —.
Occupation: Wiper.
Key: #76.
Employer's Address: W. S. Granton O house.
Date & Place of Accident: June 23-12 Granton.
Time: 12.30 noon.
Date & Place of Exam't'n " " " N. H. Hospital.
Time: 3 P. M.
Persons at Examination: Dr. Fendrich, Cassidy & Nurse.
Attending Physician: —.
Address: —.
Former Doctors & for what Ills: —.
What Lodge, Society, Casualty Co. & Dr. of Same: —.
Probable Duration of Partial Disability: —.
Of Total Disability:—.
And Prior Accident:—.
When, Where, How: May 13-12 hurt by hammer in N. DD. Mac shop. att. by Dr. Wilfer.
Previous History: —.
Is Claimant Abed, in Chair or up Around Bed: —.
Attending Doctor made — House Visits and — Office Visists.
Account of Accident as Given by Claimant: —.

327 EXHIBIT P-4.

I turned a switch and as engine came I jumped on and I slipped & fell under engine wheel went over my foot.

LOCATION OF INJURY; CUTS, &C



ATTENDING DOCTOR STATES

· unsp

Notes for Opinion, Diagnosis & Prognosis.
Nov 12 1914 will be 20.
13–19
12 18
11 17
3 26 1914
6 23 1912

9 3 2

328 EXHIBIT D-1.

License No. 2489.

Application of Michael Tonsellito.

Address, No. Bergen, N. J. No. 647, Street, 5th St.
Issued.
Renewed. 1-6-14.
To operate an automobile of the. Strike out class not desired.
First class: (Less than 30 H. P.)
Second class: (30 H. P. and over.)
If previously examined and licensed state year, 1913, also license No. 14371.

329 EXHIBIT D-1.

STATE OF NEW JERSEY,
County of Hudson, ss:

Michael Tonsellito being duly sworn says that — is the person in the above application; that — is above the age of sixteen years; that — is physically competent to operate a motor vehicle of the rating for which application is made, and — is thoroughly familiar with such portions of such vehicles as is necessary to secure safe operation of the same; that — has operated motor vehicles approximately — miles, covering a period of — years.

— further says that — has read the New Jersey Motor Vehicle Law of 1906 and amendments thereto and fully understands it, and hereby promises not to wilfully violate the provisions thereof.

Signature, MICHAEL TONSELLITO.

Subscribed and sworn to before me this 6 day of Jan. 1914.

A. HARRY ELBORO,
Notary Public, N. J.

N. J. Dept. of Motor Vehicle Registration and Regulation.

License No. 14371.

Application of Michael Tonsellito.

City or Town. Address, No. Bergen, No. 647. Street, 5th.
Issued.
Renewed.
To operate an automobile of the: Strike out class not desired.)
First class: (less than 30 H. P.)
Second class: (30 H. P. and over).
If previously examined and licenses state year also license numbe
(Entered.)

330 EXHIBIT D-1.

STATE OF NEW JERSEY,
County of ——, ss:

Michael Tonsellito being duly sworn says that — is the pers named in the above application; that — is above the age of sixte years; that — is physically competent to operate a motor vehicle the rating for which application is made, and — is thorough familiar with such portions of such vehicles as is necessary to sec safe operation of the same; that — has operated motor vehicles proximately — miles, covering a period of — years.

—he further says that — has read the New Jersey Motor Vehi Law of 1906 and amendments thereto and fully understands it, a hereby promises not wilfully to violate the provisions thereof.

Signature, MICHAEL TONSELLITO

Subscribed and sworn before me this 12 day of July 1913.

A. E. KITTREDGE,
N. J. Dept. of Motor Vehicle Registration and Regulation.

(Reverse.)
(3509.)

State of New Jersey.

Department of State.

Commissioner of Motor Vehicles.

To the Agent of the Motor Vehicle Department:

You are hereby instructed to issue Driver's License to Michael Tonsellito, who has been examined by the Chief Inspector and is certified by him to be a proper person to receive such license.

Dated July 12/13.

By order of

JOB H. LIPPINCOTT, *Commissioner.*

Examined and approved by
ED. JOHNSON,
Chief Inspector.
J. A. S.

(Ex. D-2.)

331 EXHIBIT D-3.

(Short hand notes of D-4.)

EXHIBIT D-4.

P. I. R. 42, 129. Michael Tonsellito, injured at Granton, New Jersey, June 23rd, 1912.

North Hudson Hospital.

WEEHAWKEN, N. J., July 31st, 1912.

Mr. O. M. Quackenbush, Claim Agent.

Statement of Michael Tonsellito.

By Mr. Quackenbush:

Q. This is Mr. Mulcox, a stenographer, Michael. Well, sir, now, Michael, we called here to see if you would not tell us again about how your accident happened; we want to get it exactly right, don't you know, and I want to find out from you again. I want you to go right over it again, won't you?

A. If I can remember it all.
Q. Tell it as you remember it, just as closely as you can?
A. Well, Freddie Orr calls me up to be his fireman and told me though to get a hook and scoop; I forgot to tell you that; he told me to get a hook and scoop, and we went down and went as far as the machine shop, don't you know, and we jumped off and threw a switch and we went right up straight, and then we went and took some cars in, didn't we, wasn't it?
Q. I do not know.
A. We took some cars and pulled them down on one track, and then we went down around near the machine shop again, then we switched out and went up on another track to go — the store house and we went for a barrel of oil, and before we got to the store house there was a switch to be thrown and I jumped off and I threw
332 it, so I didn't know Mr. McKee was on the front end, so I threw the switch and the engine was coming ahead and I wanted to jump on and I slipped, my right leg slipped and the left one went under the wheel and then I fell down and Freddie Orr stopped the engine rig*th* away. I could not hardly remember it all now.
Q. Well now, Mike, where did that engine start from?
A. It started from the round house.
Q. At Granton you mean?
A. Yes.
Q. And you went down towards you say the machine shop?
A. Yes.
Q. What machine shops do you mean, at Granton or New Durham?
A. New Durham shops, and then we went up to the store house that was where we could get by, we could not get by any other way.
Q. Where did you go from the machine shop?
A. Right up to the round house. You seen the tracks from the ash pit to the store house track; we had to go right down along there.
Q. You mean you went to the store house instead of the round house?
A. We had to go to the store house, yes.
Q. Well, how far, Mike, do you think it was from the store house to where you got hurt?
A. I don't know.
Q. You don't know?
A. You was there.
Q. Yes, I know it. So were you?
A. Yes.
Q. How fast do you think that engine was moving when you run over?
A. About three miles an hour I guess.
Q. Do you remember hearing Orr tell you not to get off the engine when you did get off?
A. No, I didn't hear him say nothing.
Q. Did he say anything to you at all about getting off?
A. No, he didn't say anything. I told him, "Fred there i

vitch to be thrown", and he didn't say anything, so I jumped off.

333 Q. Did you hear him warn you not to jump on?

A. No.

Q. When you started to get on?

A. No, I did not hear him.

Q. Well now, how high, do you think, Mike, was the step from he ground where you jumped?

A. About a foot and a half or something like that, two foot.

Q. And you were standing on the side, on the engineer's side, on he side of the track, weren't you?

A. Yes.

Q. Well, now, that side of the track slopes down?

A. Yes. Well, the other side kind of slopes, too.

Q. Yes, I guess both sides do slope?

A. Yes.

Q. Now, you say that Orr asked you to be his fireman?

A. Yes, he told me to get a hook and scoop.

Q. That was before you left the round house at all?

A. Yes, he said get a hook and scoop and come be my fireman, see!

Q. Did you see Mr. McKee at all before you got off to throw that switch?

A. No, I didn't see him.

Q. Do you know where he got on the engine?

A. No, I didn't see him get on the engine at all; the only thing, I seen him when I jumped off to throw that switch up there.

Q. Yes.

A. That is the only time I seen him.

Q. Well, I was speaking about before this. Had you seen him before that time?

A. No.

Q. Then you do not know where he got on?

A. No.

Q. Well, do you know whether he had thrown any switches before this?

A. No, I didn't see him. I threw a couple of switches and I think one switch the switchman throwed right near the water plug there.

334 Q. Did Orr tell you, Mike, that McKee would throw that switch?

A. No.

Q. Cannot you explain a little more fully, Mike, as to how you happened to fall under the engine when you jumped for the step?

A. Well, I was going to jump for the step and I guess I must have slipped; this leg slipped (indicating), and this leg went right under he wheels, see!

Q. Did you have hold of the grab handle?

A. Yes, I had both the grab irons, sure. I think his hand slipped and I went this way (motioning), and moved on one hand.

Q. Did you have your feet on the step at all, the engine step?

A. Yes, this foot (indicating) was up on the engine step and it

slipped, see! This slipped and that went right under the wheel; i
come over on the side, see!

Q. Then it was your right foot that slipped off the step?

A. Yes, this is my right foot, and this the one that is cut off.

Q. This was on a Sunday, wasn't it?

A. Yes, it was about half past twelve.

Q. Do you remember whether it was a dry day, that is, whethe
the weather was pleasant or dry?

A. It was a nice clear day, sun and all out.

Q. How old are you, Mike?

A. Seventeen.

Q. And what is your address?

A. 647 Fifth Street, New Durham. In case you send letters y
write Weehawken, because the letter carrier takes them; unless y
do that you have to walk down to Weehawken Post Office for them

Q. What is your father's name?

A. James Tonsellito.

Q. And how long have you worked for the company?

A. For over a year.

Q. And how much do you get, or how much did you get bef
you got hurt?

A. $1.60 a day; sixteen cents an hour; I used to work t
335 twelve, eleven hours and all like that; according to how ma
hours I would work. Of course they used to put me
pumping and everything; Mr. O'Connor used to put me on all ki
of work. That was one job I didn't like, this pumping.

Q. You were listed wiper, engine wiper, or headlight cleaner?

A. Engine wiper. I was on a headlight job that Sunday.

Q. Well, Mike, had you ever fired an engine before?

A. I used to pump engines.

Q. I say had you ever fired an engine before?

A. On the road?

Q. Well, in the yard there, any place, had you ever fired an
gine as you were firing this one for Orr?

A. Sure, I used to help Freddie Orr out; we used to go down
water and everything like that.

Q. How many times do you suppose you fired an engine?

A. As many times as we used to go for water; the tank use
be empty and we used to go down there.

Q. How many times do you suppose you have fired an engine
Orr?

A. I don't remember.

Q. Did you ever fire one for anybody else except Orr?

A. No, Orr or the turn-table man that was with Freddie Orr
he wasn't there when I got hurt.

Q. I know that.

A. Sometimes he used to go down for water and I used to go
with him.

Q. Orr was handling this engine?

A. Yes.

Q. Do you remember what the number of that engine wa

A. 73091.
Q. Mike, was the engine running forward or backward?
A. Ahead.
Q. In a forward motion?
A. Yes.
Q. What do you think, Mike, the reason was that you fell?
A. I slipped.
Q. What made you slip?
A. It was too high. The ste too high from the ground.
Q. Oh! Did you stu all?
A. No.
Q. Now let me ask you, Mike, were you supposed, that is, were you expected to get on an engine and fire it if you were asked to?
A. Well, I had my work all caught up and Freddie Orr called me, so I went along with him.
Q. Well, I mean was that a part of your duty to do that if you were asked to do it if you had your work caught up?
A. If the boss told me to, I would.
Q. Who was your boss?
A. Mr. O'Connor.
Q. What is he, the round house foreman?
A. Yes, general foreman he was when I left down there.
Q. Well, did he tell you to fire this engine?
A. No, Freddie Orr called me.
Q. Do you think of anything more about it at all, Mike?
A. No.
Q. Anything you want to say about it Mike; shoot it out?
A. I nearly forgot it all. It must be more than what I said.
Q. What is that?
A. Before when I told you all about it, it must be more than what I said.
Q. I don't remember that you said anything then that you have not said now?
A. Only there was a couple of ash pit men around.
Q. There were. Did they see the accident?
A. Yes.
Q. Do you know who those men were, Mike?
A. I think there was one fire cleaner. I know there was a fire cleaner there and one of those men that shovels the ashes and throws it in a pile.
Q. What are they, Americans?
A. Italians.
Q. Do you know how long you will have to stay in the hospital?
A. Unless I ask the Doctor. Well, I can't go to work right away, can I?
Q. I guess not.
A. I mean the Doctor told me I can't get an artificial foot for six months, that is what I heard.
Q. I was asking how long you think you will have to stay in the hospital here?

A. I can't tell.
Q. You walk around on crutches?
A. Yes, my father is going to get me a pair; these are too small
Q. How are you feeling most of the time?
A. My leg don't pain me.
Q. Don't you feel good otherwise, too?
A. Sure.
Q. How is your appetite?
A. Fine. I eat like everything.

I certify the foregoing to be a true and correct report of the conversation had between Mr. O. M. Quackenbush and Mr. Michael Tonsellito, and attach hereto shorthand notes of which the above is a transcript.

FREDK. B. MULCOX,
Stenographer, 150 *Nassau Street, New York City.*

338 EXHIBIT D-6.

Michael Tonsellito, at Granton, N. J., June 23, 1912.

Statement of Michael Tonsellito, Engine Wiper, Residence 647 *Fifth St., New Durham, N. J.*

I am 17 years of age, single, and I live with my parents at the above address. I have been in the service of the Company a little over a year.

My accident happened at about 12:30 P. M. on June 23rd. Engine #3791 started out from Granton Engine House to go over to the store house after a barrel of oil. That engine was being handled by the hostler, Fred Orr. Orr did not have any fireman with him. I was filling headlights and had my work caught up, so Orr asked me to get on the engine and be his fireman. I did so and got the steam up from 100 to 180 pounds. The engine had to go south in order to switch upon the store house track. The engine was running light with no cars attached. At a point a little below the ash pit the engine switched upon the store house track. Then we had to go down toward the machine shop, then switch up toward the store house. I do not know where Mr. McKee got on the engine. When we got up toward the storehouse there was a switch which had to be thrown and I jumped off on the engineer's side to throw it. The engine had nearly stopped when I got off, and stopped as I was getting off the last step. Orr did not tell me to throw the switch, and he did not tell me not to throw it. He said nothing about it at all. When I went up to throw the switch I saw McKee on the front end of the engine. I told him that I would throw it. I threw the switch, then the engine started ahead and I waited for it to come so I could get on. The engine was just moving, running not over 2 or 3 miles an hour. I stood on the engineer's side and when the engine passed me I jumped for the step between the

ıgine and the tank. I did not hear Orr call to me not to jump. caught hold of the grab irons and got my right foot on the lower ep. My foot slipped off the step and my left foot went under the heel of the tank and the wheel ran over it. Orr stopped the engine uickly and jumped off. He and a couple of ash pit men carried me) the round house and from there I was sent to North Hudson Hos- ital in an ambulance. The track at the place where I got hurt is igher than the ground on each side, and the bank slopes sharply own from the ends of the ties. The engine step is even with the ends f the ties, so that made a high step from the place where I stood hen I jumped.

The weather was pleasant, and the engine step was dry. The step as not slippery. The reason I fell was because I could not jump igh enough to reach the step and get on it.

Fred Orr was not to blame in any way for the accident. My foot as taken off at the Hospital that same day. I am feeling pretty ood, but I have a good deal of pain.

Written at North Hudson Hospital, at Weehawken, N. J., on the 7th day of June, 1912.

We saw this statement read by Michael Tonsellito and heard him dmit it was full, true and correct, but he refused to sign same.

O. M. QUACKENBUSH,
Claim Agent, Wkn., N. J.
KATE L. B. TULLY,
Supt. North Hudson Hosp.

339 EXHIBIT D-3.

Michael Tonsellito, at Granton, N. J., June 23, 1912.

349 Written at North Hudson Hospital at Weehawken, N. J., on the 27th day of June, 1912.

We saw this statement read by Michael Tonsellito and heard him admit it was full, true and correct, but he refused to sign same.

O. M. QUACKENBUSH,
Claim Agent, Wkn., N. J.
KATE L. B. TULLY,
Supt., North Hudson Hosp.

341 *State of Case.*

(Filed February 15, 1915.)

Hudson County Circuit Court.

MICHAEL TONSELLITO, an Infant, Who Sues by His Next Friend, JAMES TONSELLITO, Plaintiff,

vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant.

Action at Law.

JAMES TONSELLITO, Plaintiff,

vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant.

Action at Law.

State of the Case.

Upon the trial of the issues joined in the above stated causes, the defendant requested the Court to direct the jury to find as a fact as follows, pursuant to Rule 70, Practice Act 1912:

The Court directs the jury to answer the following question:

At what point did you find, as a fact, that the plaintiff Michael Tonsellito attempted to board the engine at the time of the

342 occurrence of the injury complained of?

And in answer to the question as to where Michael attempted to board the engine, say that they find he attempted to board the engine at the air-pipe.

The Jury returned to the Court Room for further instructions.

Foreman of the Jury: I would like to know how we can place where this accident occurred—say the spot between the pipe and switch; whether we have to have that exact spot, or just merely the part of it.

The Court: You want to know how you are going to designate in answer to the question that the Court put to you, the location that you will find was the location of the happening?

A Juryman: In feet.

The Court: Not in feet—I suppose you would be unable, because there is probably nothing in feet that you could measure. I don't know how I can advise you, gentlemen, except you might possibly use—this is only a suggestion on my part—you might possibly use as a point from which to determine or fix the spot, the loop in the air pipe, which is a well-defined and well-designated point now in the case. Now, how exactly you will be able to find it I am unable to say. You may be able to take that loop in the pipe, which I see

s a well-defined point in the case, and designate it with reference to hat; that is, north of it, or at it, or south of it; and it may be possible, if you can recall the testimony, to be able to give under certain conditions the distance from that point with reference to the testimony that was given by the engineer regarding the different sections on that blue print map. You will probably recall he gave you the distance from a certain point. Whether that was the
343 pipe I do not remember now, or from the switch I-J. He gave you the distance of each cross-section made. So that you may be able to fix the spot from that, or you may be able to fix it by reference to the cross-sections marked on that map, or by reference to the switch.

A Juryman: Your Honor, can we fix the distance—for instance, we can say five feet this side of a certain point, within that radius?

The Court: Yes; if you find anything upon which you can fix it, anything at all that will as nearly as possible fix it. It is very difficult for me to tell you, because I don't know what your minds are—I have no right to, either. Anything you can fix it from, whether that map or anything else.

344 Hudson County Circuit Court.

MICHAEL TONSELLITO
vs.
NEW YORK CENTRAL & HUDSON RIVER R. R. Co.

JAMES TONSELLITO
vs.
NEW YORK CENTRAL & HUDSON RIVER R. R. Co.

On Application for Rule to Show Cause.

Conclusions.

Alexander Simpson, Esq., Att'y for Plaintiff.
Messrs. Vredenburgh, Wall & Carey, Att'ys for Defendant.

Application having been made for rules to show cause October 20, 1914, being within six days from the date of rendering of verdicts therein, and the court having taken under consideration the granting of the rules applied for, and having considered that the same should not issue the application therefor is denied.

Some question has arisen as to the location intended to be designated in the jury's answer, by their verdict, as to the place or point of happening of the accident to the plaintiff, Michael Tonsellito, as the jury found the same from the evidence.

345 Having in mind the prominence given throughout the trial to the "loop or bend" in the air pipe and the jury's request to the Court for further instructions as to the manner in which they should designate the point or place they found to be the point marking the accident, the Court has, in considering these ap-

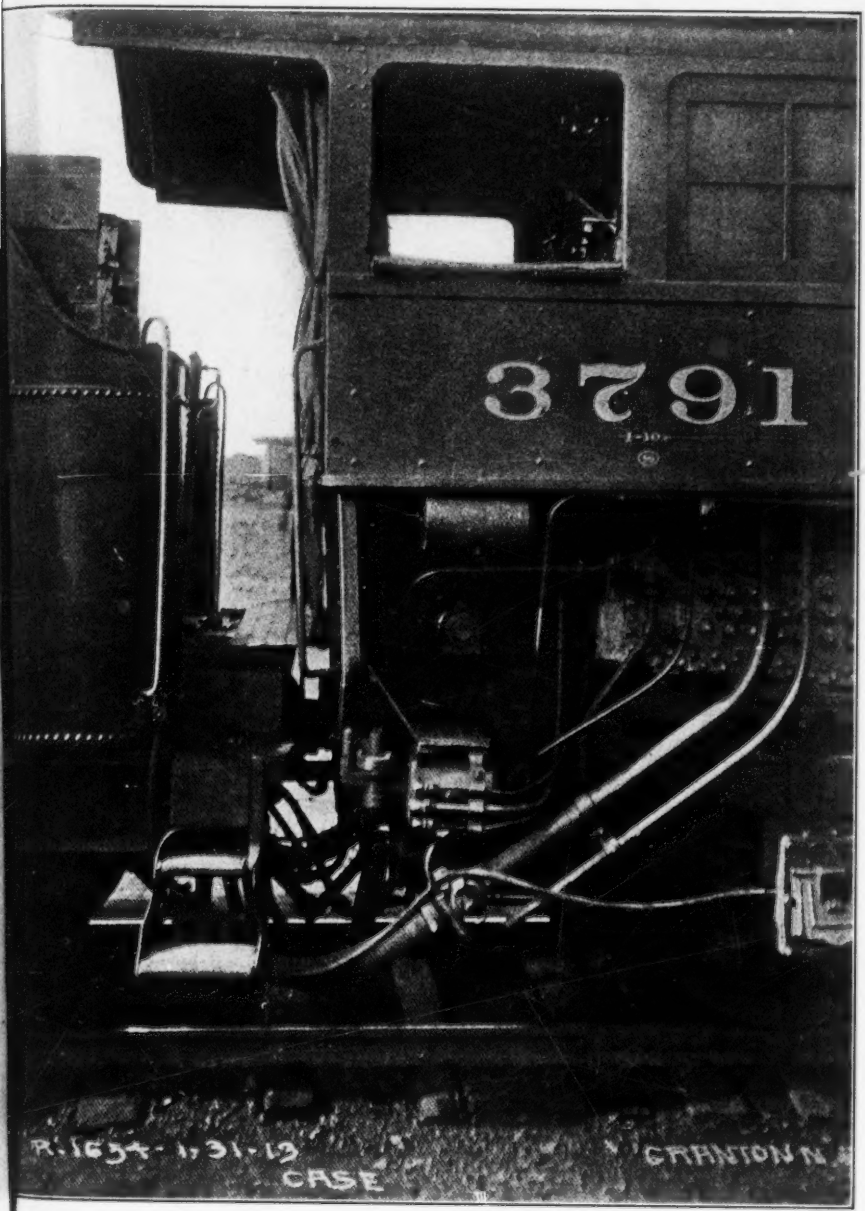
plications, considered the jury's reference to the air pipe, to be t
that point therein designated throughout the trial as the "loop o
bend."

November 4, 1914.

LUTHER A. CAMPBELL, *Judge.*

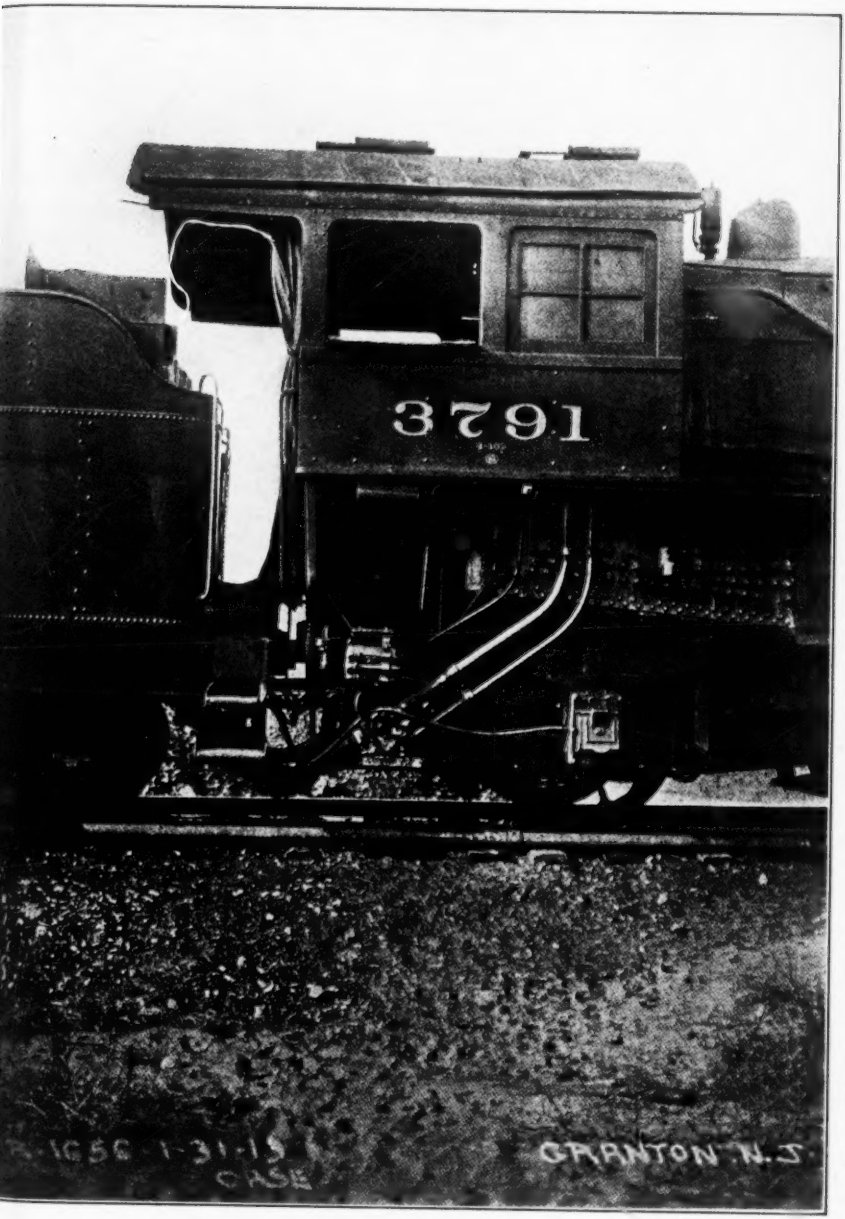
346 (Indorsed:) Hudson County Circuit Court. Michael Ton
sellito vs. N. Y. Central & Hudson River R. R. Co. Jame
Tonsellito vs. Same. On application for order to Show cause. Stat
of the case. I hereby acknowledge service of within State of th
Case February 13, 1915. Alex. Simpson, Att'y for Plaintiffs. Vr
denburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City
N. J.

(Here follow pictures marked pages 347 to 352.)



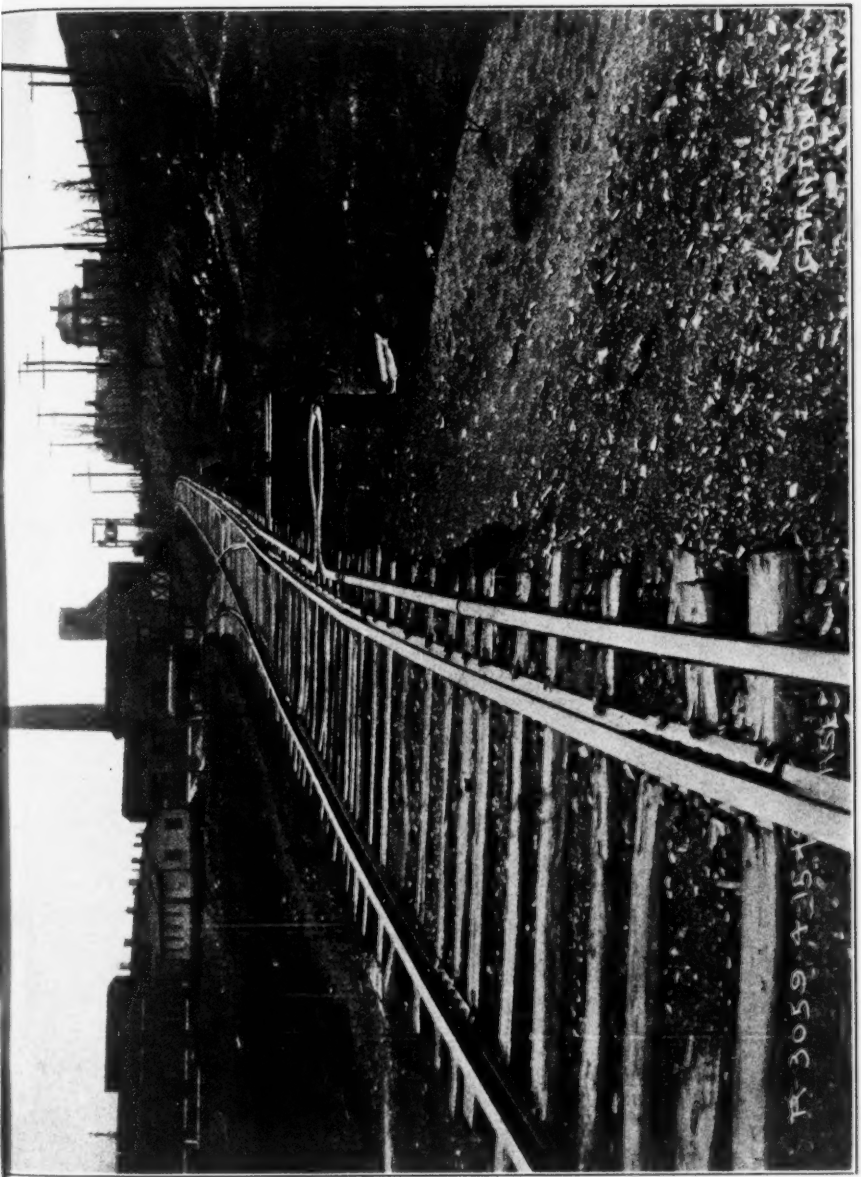
624.

N. Y. C. & H. R. R. R. Co.
v.
[illegible] } p. 347.



624.

N. Y. C. & H. R. R. R. Co.
v.
Tangelillo
p. 348.



624.

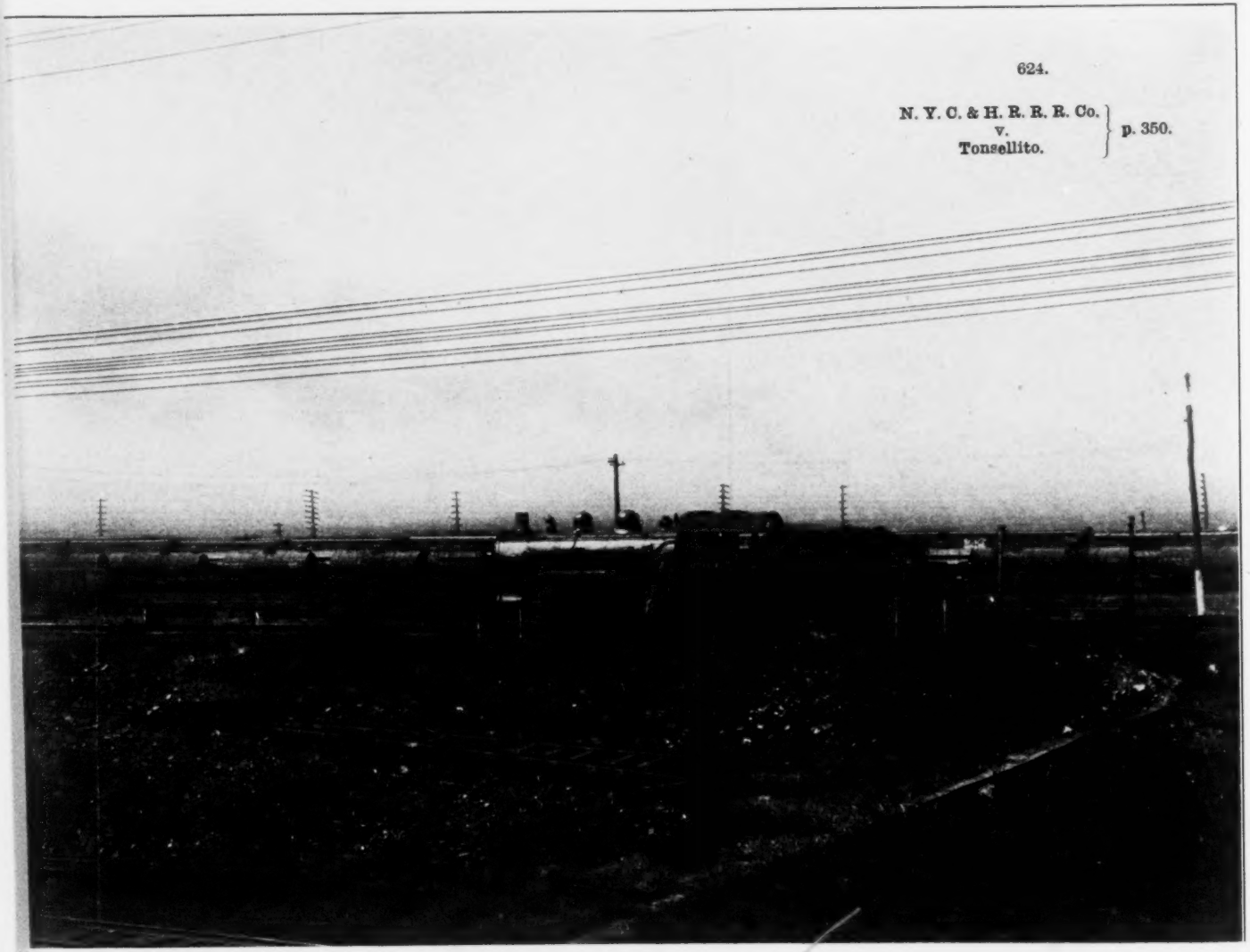
N. Y. C. & H. R. R. R. Co.
v.
Tonsellito.

p. 349.

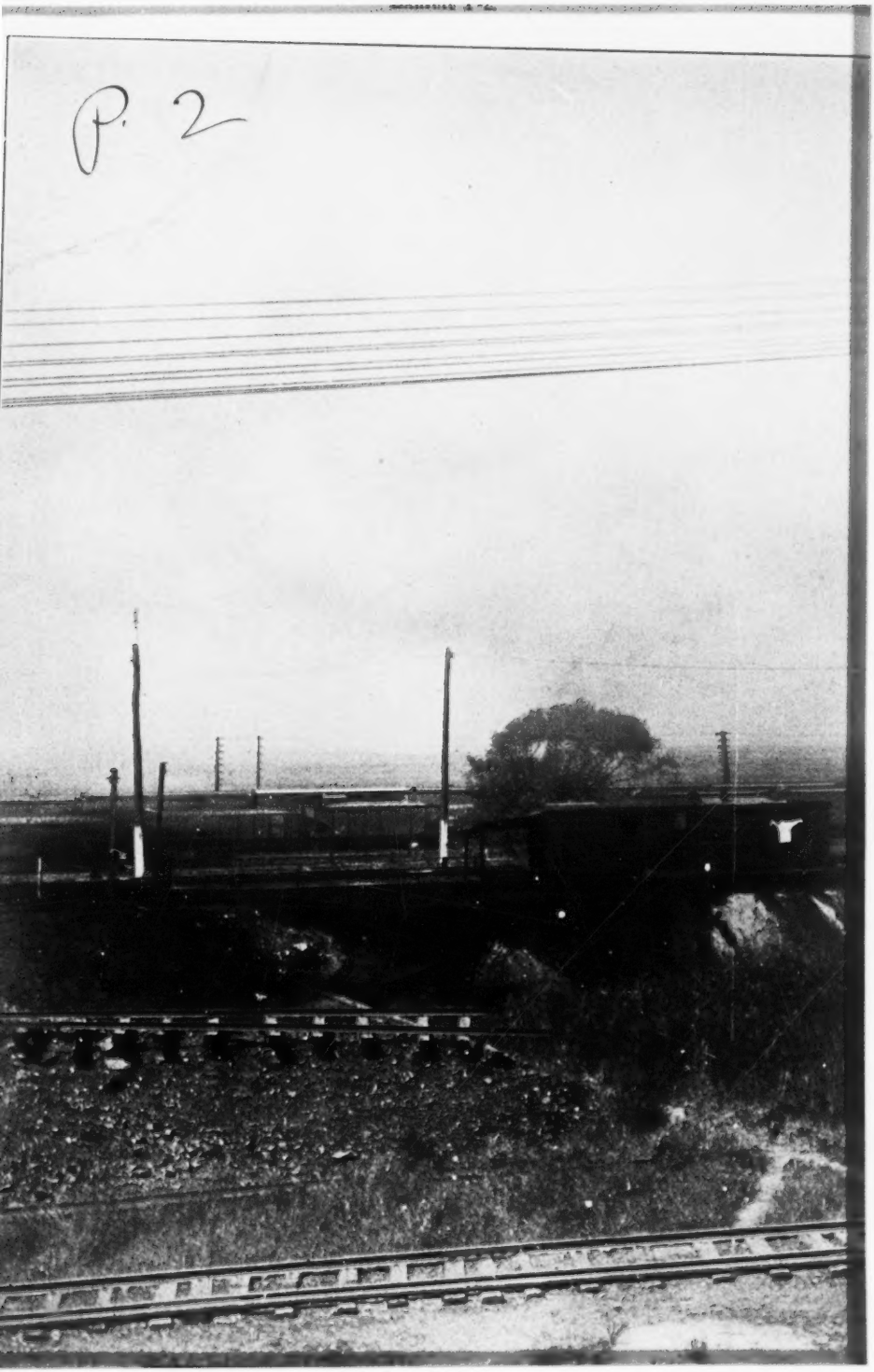

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624.

N. Y. C. & H. R. R. R. Co.
v.
Tonsellito.
p. 350.



P. 2



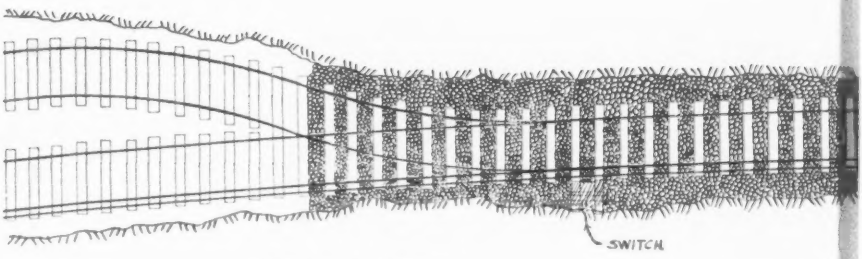


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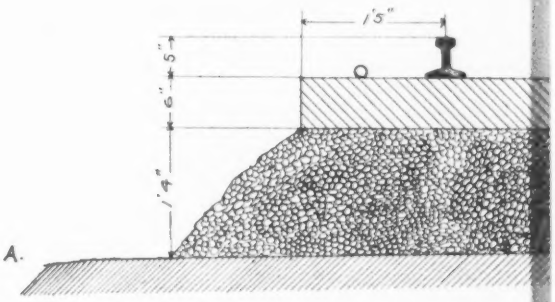
N. Y. C. & H. R. R. R. Co.
v.
Tonsellito.
p. 351.

Exhibit P-3.

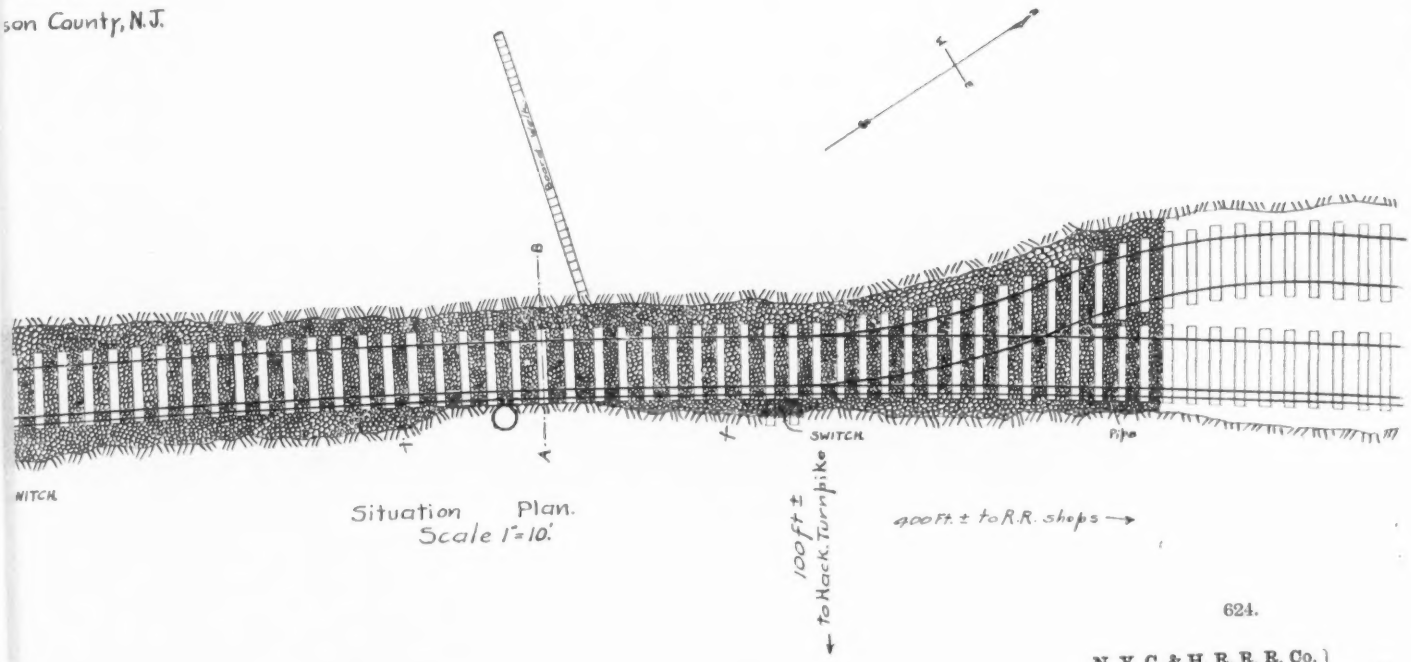
West Shore R.R. & N.Y.S. and H.R. R.R. Yards.
at New Durham, North Bergen, Hudson County, N.J.



← 2000 ft ± to R.R. Shops.



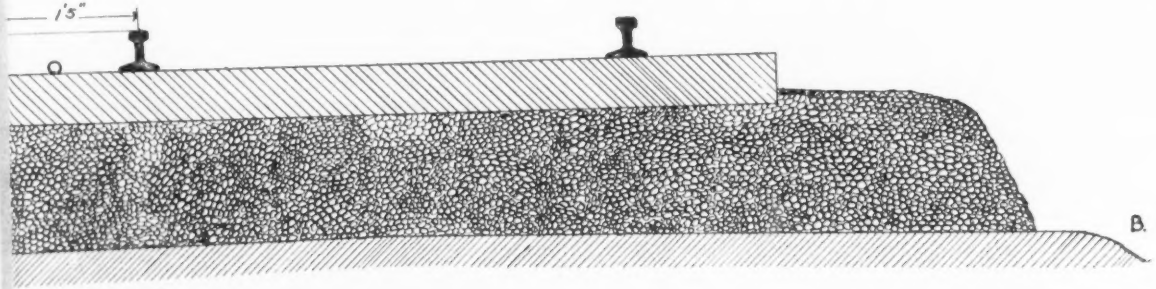
Yards.
son County, N.J.



Situation Plan.
Scale 1"=10'

624.

N. Y. C. & H. R. R. R. Co.
v.
Tonsellito. } p. 352.



Section through A.B.
Scale 1"=1'

Oct 7th 1914.

353 STATE OF NEW JERSEY:

Court of Errors and Appeals, March Term, 1915.

Appeal from Hudson Circuit Court.

Error to — Court.

MICHAEL TONSELLITO, an Infant, &c.,
and
NEW YORK CENTRAL & HUDSON RIVER RY. CO.

No. 54 of March Term, 1915.
Date June 1915.
Chancellor presiding.
Opinion by Minturn, J.

Check list.	Affirmed.	Reversal.	M.
The Chancellor	1		
" Chief Justice	1		
Mr. Justice Garrison	1		
" " Swayze	1		
" " Trenchard	1		
" " Parker	1		
" " Bergen	1		
" " Minturn	1		
Judge Vredenburgh	1		
" White	1		
" Heppenheimer	1		
Totals			

354 New Jersey Court of Errors and Appeals

No. 53 and 54. March Term, 1915.

MICHAEL TONSELLITO, an Infant Who Sues, etc.,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

JAMES TONSELLITO
vs.
SAME.

Appeal from Hudson Circuit.

Argued March Term, 1915. Decided June Term, 1915.

Alexander Simpson, For Plaintiffs,
Vredenburgh, Wall & Carey, For Defendant.

(1) Where the infant plaintiff about seventeen years of age, was employed by defendant, a carrier engaged in interstate commerce,

to fire its engine preparatory to the same being attached to a train schedule to run from Weehawken, New Jersey, to Ravenna in New York, and while assisting in operating the engine in the railroad yard, for the purpose of taking on a barrel of oil to be carried on the engine to Ravenna, the plaintiff was injured,
355 Held, that at the time of the accident the plaintiff and defendant were engaged in interstate commerce, within the meaning of the terms of the Federal Employers' Liability act.

(2) The questions arising upon the controverted testimony as to the negligence of the defendant, under the circumstances, and as to the assumption of risk by the plaintiff, Held, to be jury questions.

(3) In the suit by the father to recover damages sustained by reason of the injury to the infant plaintiff, Held, that the Federal Employers' liability act does not by its terms extend to the common law right of the father, and that in the absence of a clear legislative intent to so apply it, the common law right of recovery in the father subsists.

The Opinion of the Court Was Delivered by Minturn, J: These appeals practically involve but one question. The first presents the injury to the son, a young man about seventeen years of age, while employed by defendant upon a locomotive at its yard in Weehawken, and the other the resulting injury to the father by reason of the boy's fatality. The young man was engaged as a general worker in the railroad yard. Occasionally he was put to work at firing locomotives preparatory to making their schedule trips. Such was his occupation upon the day of the accident.

The locomotive upon which he was working was about to be attached to a train running between Weehawken, in this State and Ravenna in the State of New York. The work of firing her was preparatory to the entrance of the regular engineer who would take her in charge and operate her upon her schedule trip be-
356 tween the States. During this interim of waiting it became necessary to take on a barrel of oil from an adjacent store house, and as substitute for the engineer named he drove the engine in the direction of the store house. Michael Tonsellitto, the plaintiff, left the engine en route in order to adjust a switch, and having done this he attempted to again board the engine and while engaged in that act the engine was started and he was thrown under the wheels and sustained the injuries complained of.

The action was brought under the provisions of the Federal Employees' liability act of 1908. The cases were tried together and a verdict for the plaintiff was rendered in each case. The fundamental inquiry in the case presented by defendant is whether the plaintiff Michael and defendant were engaged in interstate commerce at the time of the accident. The act in question has received a construction by this Court in two instances.

In Pierson v. N. Y. S. & W. R. R. 54 Vr. 661, the plaintiff was engaged in removing old rails between two points upon the railroad within this State and supplanting them with new ones. While engaged with others in removing a new rail from the car to a point

here it was intended to locate it, preparatory to placing it in osition, one end of it dropped from the hands of those holding and injured the plaintiff. We there held applying the construc-on given to the Federal act by the United States Supreme Court n Mondon v. N. Y. N. H. & Hartford R. R. Co. 223 U. S. 1, and by he United States Circuit Court of Appeals for the Third Circuit in 'edenson v. D. L. & W. R. R., 197 Fed. Rep., 537 that the work f installing new rails between interstate points on an interstate and intrastate road-bed, was not engaging in interstate com-57 merce at all, but a preparation for engaging therein in the future.

In Granger v. Penna. R. R. 55 Vr. 338, the plaintiff when in-ured was engaged in placing a cover over the mechanism of a witch which he had just oiled when he was struck and injured by a hunted car.

The tracks were used for inter-state and intrastate traffic, as the ailroad business might require, and we there held that neither he car nor the plaintiff was engaged at the time of the accident n inter-state commerce.

Since the adjudication of those cases the case of Pederson v. D. L. & W. R. R. (supra) has been considered on appeal by the United States Supreme Court in 229 U. S. 146, and the judgment of the Circuit Court of Appeals was reversed.

The facts in that case will bear recital, if for no other purpose han to evince the liberality of view adopted by the Federal Supreme Court in the construction of the act sub judice. The defendant was operating an inter-state and intra-state railroad for the transportation of passengers and freight. The plaintiff an iron worker was em-ployed in the alteration and repair of some of its bridges and tracks within this State. While carrying bolts or rivets over a tempor-ary bridge from a tool car to a bridge then in process of repair, both bridges being used by defendant in both kinds of commerce, the plaintiff was run down and injured by an intra-state passenger train of whose approach the engineer in charge had failed to give warning. Inter alia the Court decided and laid down this inquiry as the test of the defendant's liability under the Federal act, viz: "Is the work in question a part of the inter-state commerce in which the carrier is engaged?" Answering that inquiry 358 in the affirmative in the case sub judice, and applying the inquiry to the facts presented, the Court stated, "It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words it was a minor task which was essentially a part of a large one, as is the case when an engineer takes his engine from the round-house to the track on which are the cars he is to haul in inter-state commerce," citing Lamphere v. Oregon R. & N. Co. 196 Fed. 336; Johnson v. Southern Pac. Co. 196 U. S. 1.

The reasoning of that case we conceive, to be dispositive of the case at bar. Where it is indisputable under the testimony that the engine upon which the plaintiff Michael was employed was preparing for its inter-state trip at the time of the accident, and

was actually proceeding to take on a barrel of oil which was destined for transportation from the store house of defendant at Granton in New Jersey to its store house at Ravenna in the State of New York. Such a situation necessity requires an affirmative answer to the test, "Is the work in question a part of the interstate commerce in which the carrier is engaged?" The decision in the Pederson case was followed by the decision in Illinois Central Railroad v. Behrens, 233 U. S. 473. That case presents the direct antithesis of the former case, and serves to enunciate distinctly the clear line of demarcation which the Federal Supreme Court has applied in the construction of this legislation. These cases with exhaustive annotations are also found in 33 Am. & Eng. Ann. cas. p. 163.

We are not concerned on this appeal with the question of the relative weight of the testimony as to the negligence of the defendant in the operation of its engine or the alleged defect of
359 its road-bed. There is testimony in the case from which both may be legitimately inferred, as well as the questions whether the risk was so obvious that the plaintiff assumed it.

Burns v. Telegraph Co. 70 N. J. L. 784.

The weight and credibility of this testimony contrasted with the facts adduced in behalf of the defendant's contentions, were questions for the consideration of the jury. The motions for a non-suit and to direct a verdict for defendant were therefore properly refused.

Dickinson v. Erie R. R. 85 N. J. L. 586.
Clark v. Public Service Co. 86 N. J. L. 144.

The existence of contributory negligence under the provisions of the Federal act is made a basis not as at common law for a judgment of non-suit, but the statute adopts the admiralty rule of diminishing the damages "in proportion to the amount of negligence attributable to such employee." That feature of the case is therefore not before us upon this appeal.

The plaintiff, James Tonsellito claims as father of the infant plaintiff, Michael, and recovered a verdict of $1,000. The defendant contends that the Federal statute concedes no such right of action in the father, and limits recovery to the personal representative only in case of death for the benefit of the next of kin. But we do not construe the Federal act as repealing either expressly or impliedly the father's right of action as it existed at common law. It purports to deal only with cases involving the death of the employee, and in the absence of an intent clearly expressed or necessarily implied that Congress intended to take away by this corrective or remedial act, the legal status of third
360 parties as fixed by the immemorial rules of the common law, we must assume that such legal rights still subsist unimpaired.

The rule of construction is "that an affirmative statute giving

ew right does not of itself, and of necessity destroy a previously xisting right."

Brooms Legal Maxims 508.

O'Flaherty v. McDowell, 6 H. L. cas. 157.

And so it is held that statutes which take away, change or diminish fundamental rights, statutory remedies for rights unknown o the common law, and statutes which provide new and extraordiary remedies must be strictly construed, both as to the cases menioned within their terms, and as to methods to be pursued.

36 Cyc. 1188 and cases cited.

Our examination of the remaining exceptions contained in the ecord has led us to conclude that they were non-injurious to the lefendant in the view of the case here presented.

The judgment under review will therefore be affirmed.

Endorsed:

"Filed Jun- 14 1915. Thomas F. Martin Clerk."

361 New Jersey Court of Errors and Appeals, June Term, 1915.

Between

MICHAEL TONSELLITO, an Infant, Who Sues, etc., Respondent.

vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

On Appeal from Hudson Circuit Court.

Order on Affirmance of Judgment.

This cause having been duly argued at the March Term, 1915 of this court by Messrs. Vredenburgh, Wall & Carey, of counsel for the appellant, and Alexander Simpson, Esq., of counsel for the respondent, and the court having considered the same, and finding no error in the record or proceedings in the Circuit Court.

It is thereupon, on this Fourteenth day of June in the year of our Lord one thousand nine hundred and fifteen, ordered and adjudged that the judgment of Hudson Circuit Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Hudson Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

ALEX SIMPSON,
Attorney for Respondent.

362 [Endorsed:] New Jersey Court of Errors and Appeals, June Term, 1915. Michael Tonsellito, an infant, who sues, etc., Respondent, vs. the New York Central and Hudson River

Railroad Company, Appellant. On Appeal from Circuit Court. Order Affirming Judgment. Alex. Simpson, Att'y. Filed Jun. 18, 1915. Thomas F. Martin, Clerk.

363 Supreme Court of the United States.

MICHAEL TONSELLITO, an Infant, Who sues by James Tonsellito, His Next Friend, Plaintiff-Defendant in Error,

vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant-Plaintiff in Error.

Petition for Writ of Error.

To the Honorable Justices of the Supreme Court of the United States:

The petition of The New York Central and Hudson River Railroad Company respectfully shows.

1. That the Plaintiff in Error is a railroad corporation of the State of New York, and, at the time of the occurrence complained of in this suit, was the lessee and operator of a railroad extending from Weehawken, Hudson County, New Jersey, to Ravena, Albany County, New York, and beyond.

2. Defendant in Error was employed by the plaintiff in error at the round-house in Granton Yard, near Weehawken aforesaid. He was injured on June 23rd, 1912, while attempting to board an engine at a switch near the store-house in said yard.

3. The engine was in charge of Orr, a hostler, who was on his way from the round-house to the storehouse, to procure a barrel of oil which was the property of the plaintiff in error, and which was to be carried to Ravena aforesaid, for the plaintiff in

364 error.

4. Defendant in error rode with Orr on the engine from the round-house on the way to the store-house. To reach that point it was necessary to travel some distance through the yard, switching back to the store house. One McKee was riding on the pilot of the engine to turn the switch, but defendant in error left the engine without Orr's knowledge and essayed to turn it. As a result of the aforesaid accident, while attempting to board the engine, a portion of defendant in error's left foot was amputated.

5. Suit for damages under the Federal Employers Liability Act was instituted in the Hudson County Circuit Court, in the State of New Jersey. Judgment was entered in favor of defendant in error for $6500. This judgment was affirmed by the Court of Errors and Appeals of New Jersey, which is the court of last resort in said State, in all causes, and the highest court exercising civil jurisdiction.

6. There was no testimony in the case to show what was to be done with the oil when it reached Ravena, nor whether the barrel of oil was carried beyond Granton Yard. At the trial, plaintiff

in error moved for nonsuit and a verdict in its favor, on the grounds that:

(1) Plaintiff and defendant were not engaged in interstate commerce at the time of the injury complained of, and hence the court was without jurisdiction.

(2) No negligence was shown on the part of the plaintiff in error.

(3) The defendant in error assumed as a risk of his employment the danger incident to boarding the engine.

Both motions were decided adversely to the plaintiff in error, and were therefore decisions against the right or immunity from suit to which plaintiff in error was entitled under the Fed-
365 eral Statute upon which the suit was based. The Court of Errors and Appeals decided against this right or immunity, in affirming the judgment below, in a proceeding in which was claimed by plaintiff in error a right, privilege or immunity, under a statute of the United States and which had been denied by the decision of the Hudson County Circuit Court, upon which statute said action was based, which said decision of said Court of Errors and Appeals thus affirming the judgment of the Hudson County Circuit Court, is against such right, privilege or immunity.

Wherefore, your petitioner prays the allowance of a writ of error directed to the Court of Errors and Appeals of the State of New Jersey, in the last resort in all causes, being the possessor and custodian of the proceedings and judgment in this action, commanding that the said record and proceedings in said action be sent by said Court of Errors and Appeals of the State of New Jersey, to the Supreme Court of the United States, with all things concerning the same, and for citation, to the end that the errors complained of in the Assignment of Errors herewith filed by said petitioner, may be reviewed, and if error be found, that the same may be corrected conformably to the Constitution and Laws of the United States.

VREDENBURGH, WALL & CAREY,
Attorneys of Petitioner and Plaintiff in Error,
1 *Exchange Place, Jersey City, N. J.*
ALBERT C. WALL,
Of Counsel.

366 STATE OF NEW YORK,
County of New York, ss:

Edward L. Rossiter, of full age, being duly sworn, on his oath deposes and says:

I am the Treasurer of the petitioner within named, and as such am familiar with the matters in said petition set forth. The foregoing petition is true to the best of my knowledge, information and belief.

E. L. ROSSITER.

Subscribed and sworn to before me this 5th. day of August, A. D., 1915.

[Seal James Ireland, Notary Public, New York County.]

JAMES IRELAND,
Notary Public, New York County.

O. K.
J. S. I.

Cert. Filed in Bronx & West. Cos.
N. Y. Co. No. 15; N. Y. Reg. No. 7014.
Bronx Co. No. 1; Bronx Reg. No. 703.

Read on application for writ of error this 12th day of August, A. D., 1915.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

367 [Endorsed:] 3200. Supreme Court of the United States. Michael Tonsellito, an infant, who sues, &c., Plaintiff-Defendant in Error, vs. The New York Central and Hudson River Railroad Company, Defendant-Plaintiff in Error. Petition for Writ of Error. Vredenburgh, Wall & Carey, Attorneys. 1 Exchange Place, Jersey City, N. J. Filed Aug. 14, 1915. Thomas F. Martin, Clerk.

368 Know all men by these presents, That the undersigned The New York Central Railroad Company, successor to the New York Central and Hudson River Railroad Company, a corporation organized under the laws of the State of New York, as principal, and The National Surety Company of New York, a corporation authorized to do business in the State of New Jersey, as surety, are held and firmly bound unto Michael Tonsellito, an infant, who sues by James Tonsellito, his next friend, in the just and full sum of Five Hundred Dollars ($500.), to be paid to the said Michael Tonsellito, an infant, who sues, etc., his certain attorneys, heirs, executors, administrators or assigns, to which payment well and truly to be made, said corporations bind themselves, their successors, representatives and assigns, jointly and severally by these presents,

Whereas, lately in the court of Errors and Appeals, in the last resort in all causes in the State of New Jersey, in a suit pending in said Court, between Michael Tonsellito, an infant, who sues by James Tonsellito, his next friend, plaintiff-appellee, and The New York Central and Hudson River Railroad Company, defendant-appellant, judgment was rendered against said New York Central and Hudson River Railroad Company and in favor of said plaintiff-appellee, affirming a judgment of the Circuit Court of Hudson County in the State of New Jersey, entered in said Circuit Court in favor of said Michael Tonsellito, an infant, who sues, etc., and against said New York Central and Hudson River Railroad Company, which

mpany being about to apply for a writ of error to the Supreme urt of the United States to reverse the judgment in said suit and r the issuing of a citation directed to said Michael Tonsellito, an infant, who sues, etc., citing and admonishing him to be 9 and appear at a session of the Supreme Court of the United States to be holden at the City of Washington in the Dis- ict of Columbia,

Now therefore, the condition of the above obligation is such that said New York Central and Hudson River Railroad Company ail prosecute its writ to effect and answer all damages and costs, it fail to make its plea good, then the above obligation to be void; herwise to remain in full force and virtue.

Sealed with the seals of said corporations and dated this fifth of ugust 1915.

NEW YORK CENTRAL RAILROAD COMPANY, Successor to
[SEAL.] NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By A. H. SMITH, *President.*

Form approved -. S. C.

Attest:
E. F. STEPHENSON,
Ass't Sec't'y.

THE NATIONAL SURETY COMPANY OF NEW YORK,
By FRANK W. STUCKY,
[SEAL.] *Res. Vice-President.*

Attest:
M. O'LEARY,
Resident Ass't Secretary.

The foregoing bond for cost is satisfactory as to form, amount, d the sufficiency of the surety thereon.

ALEX. SIMPSON,
Attorney of Def't in Error.

Approved:
MAHLON PITNEY,
Associate Pustice of the Supreme Court of the United States.

) STATE OF NEW JERSEY,
County of Hudson, City of Jersey City, ss:

On this 5th day of August 1915 before me, the subscriber, an torney at Law duly commissioned and sworn, personally came O'Leary who, being by me duly sworn, on his oath, saith; That is the Res. Ass't Sec'y of the National Surety Company of the

State of New York, and that he resides in the City of Jersey C
that he knows Frank W. Stucky, Resident Vice-President of
National Surety Company, and he knows too, the corporate s
of the said Company; that the seal affixed to the foregoing
strument is such corporate seal; and it was affixed by the said
V. P. and the said instrument signed by the said R. V. P. as R.
P. of said Company, attested by deponent as R. A. S. by order
the Board of Directors of said Company in deponent's presence
the voluntary act and deed of said Company, that said Compa
has duly complied with all the requirements of Chapter 134 of
Laws of the State of New Jersey of the year 1902; that the g
available assets of the Company exceed its liabilities, as such
bilities are ascertained in the manner provided in said Chapt
that the National Surety Company is duly incorporated under
laws of the State of New York; and is authorized by the laws
that State and under its charter to become surety on bonds
obligations such as are mentioned in said Chapter; and has *no*
posit with the Superintendent of Insurance of the State of N
York, good securities worth at par and at market value at least T
Hundred Thousand Dollars ($200,000) held for the security
its obligations and has a fully paid up, safely invested, and un
paired capital of Two Million Dollars; and said Company has
pointed the Commissioner of Banking and Insurance
371 New Jersey and his successor in office as its true and law
Attorney in the State of New Jersey, upon whom proc
of Law can be served, and has filed in the office of the Commissio
of Banking and Insurance, a written instrument duly signed
sealed, certifying such appointment, together with the reside
and office of such Attorney, within the State of New Jersey;
that the following is a true copy of a By-Law duly adopted by
Board of Directors of the said National Surety Company on the
day of February, 1912, at a regular Meeting, to wit:

Article XIII.

Section 1. Signatures required.—All bonds, recognizances,
contracts of indemnity, policies of insurance, and all other writi
obligatory in the nature thereof, shall be signed by the Presid
a Vice-President, a Resident Vice-President, or Attorney-in-F
and shall have the seal of the Company affixed thereto, duly atte
by the Secretary, an Assistant Secretary, or Resident Assistant Se
tary. All Vice-Presidents and Resident Vice-Presidents shall e
have authority to sign such instruments, whether the President
absent or incapacitated, or not, and the Assistant Secretaries
Resident Assistant Secretaries shall each have authority to seal
attest such instruments, whether the Secretary be absent or
capacitated, or not; and the Attorneys-in-Fact shall each have
thority, in the discretion of such Attorneys-in-Fact, to affix to s
instruments an impression of the Company's seal, whether the Se
tary be absent or incapacitated, or not, or to attach the indivi
seal of the Attorney-in-Fact thereto, or to use the scroll of the

torney-in-Fact, or a wafer, wax, or other similar adhesive substance affixed thereto or a seal of paper or other similar substance
372 affixed thereto by mucilage, or other adhesive substance, or use the word "Seal" or the letters "L. S." opposite the signature of such Attorneys-in-Fact, as the case may be.

M. O'LEARY,
Resident Assistant Secretary.

Sworn and Subscribed in the City of Jersey City in the County of Hudson and State of N. J. this 5th day of August A. D. 1915 before me an Attorney at Law duly commissioned and sworn.

JULIUS J. SEIDEN,
Attorney at Law of N. J.

[Endorsed:] 3200. Supreme Court of the United States. Michael Tonsellito, an infant, who sues, &c., Plaintiff-Defendant in Error, vs. New York Central & Hudson River Railroad Company, Defendant-Plaintiff in Error. On Writ of Error. Bond for Costs. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J. Filed Aug. 14, 1915. Thomas F. Martin, Clerk.

373 Supreme Court of the United States.

MICHAEL TONSELLITO, an Infant, Who Sues by JAMES TONSELLITO, His Next Friend, Defendant in Error,

vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error.

On Writ of Error.

Assignment of Errors.

To the Honorable the Justices of the Supreme Court of the United States:

And now comes The New York Central and Hudson River Railroad Company, the plaintiff in error, and makes and files this, its Assignment of Errors:

There is manifest error in the record and proceedings herein:

1. Because the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, erred in affirming the refusal of the Circuit Court of the County of Hudson to grant a nonsuit against the plaintiff at the close of his case.

2. Because said Court of Errors and Appeals erred in affirming the refusal of the said Circuit Court, at the close of the whole case, to direct a verdict in favor of the defendant and against the plaintiff.

3. Because the said Court of Errors and Appeals erred in affirming the refusal of the said Circuit Court to find as a matter of law, that at the time of the alleged injury to the plaintiff, said plaintiff and

defendant were not engaged in interstate commerce, within
374 the provisions of the Federal Employers' Liability Act (35
Stat. at Large, 65, Chap. 149 U. S. Comp. Stat. Supp. 11, p.
1322).

4. Because said Court of Errors and Appeals erred in affirming the action of said Circuit Court in submitting to the jury for determination the question of whether or not said plaintiff and defendant were engaged in interstate commerce, within the provisions of said Federal Employers' Liability Act at the time of the alleged injury to said plaintiff.

5. Because said Court of Errors and Appeals erred in affirming the action of the said Circuit Court in overruling the question propounded by defendant's attorney to the witness James Tonsellito, as follows:

"Q. How late did he work that day?"

6. Because said Court of Errors and Appeals erred in affirming the refusal of said Circuit Court to charge the jury, at the request of the defendant, as follows:

"If the roadbed of the defendants at the place and time of the accident was similar in construction to the similar types of roadbed of other standard railroads in the locality, such as the Lehigh Valley Railroad, The Delaware, Lackawanna & Western Railroad and the Pennsylvania Railroad companies, and there was no greater distance from the roadbed itself to the top of the rails at the place and time of the accident than on such similar types of railroad, then no negligence can be attributed to defendant because of such distance then existing at such time and place of the accident."

7. Because said Court of Errors and Appeals erred in affirming the refusal of said Circuit Court to charge the jury, at the defendant's request, as follows:

"Plaintiff, Michael Tonsellito's damages in this case are limited to legal compensation for his pain and suffering, the testimony being undisputed that plaintiff was not emancipated at the time of his alleged injury, and there being no proof in the case of any interference with plaintiff's earning capacity in the future because of said injury."

375 8. Because said Court of Errors and Appeals erred in affirming the refusal of said Circuit Court to charge the jury at defendant's request, as follows:

"If the jury believe that the condition of the defendant's roadbed at the time and place of the alleged injury to plaintiff, Michael Tonsellito, occurred (even though defective in the sense of the statute under which this action is brought, which of course is denied by defendant) was as plain and obvious to the said plaintiff as to the defendant and its agents, then plaintiff must be taken to have assumed the risks of his employment in this respect, and cannot recover against the defendant on that phase of this action."

9. Because said Court of Errors and Appeals erred in affirming the action of said Circuit Court in ruling that there was evidence of defendant's negligence in the case, which should be submitted to the jury.

10. Because said Circuit Court should have directed a verdict

the close of the whole case, in favor of the defendant and against the plaintiff, on the ground that the clear weight of the evidence showed that the alleged injury complained of by plaintiff resulted from his own negligence and not from any negligence of the defendant; and that said Court of Errors and Appeals erred in affirming such action of said Circuit Court, in refusing to so direct.

11. That said Circuit Court erred in not directing a verdict at the close of the whole case, in favor of the defendant and against the plaintiff, on the ground that the alleged injury complained of by plaintiff resulted from a risk of his employment, which he assumed, and not from the negligence of the defendant, complained of by plaintiff; and that said Court of Errors and Appeals erred in affirming said action of said Circuit Court in refusing to so direct.

376 12. Because said judgment of said Court of Errors and Appeals was against said defendant, the present plaintiff in error, whereas it should have been rendered in favor of said defendant, the present plaintiff in error, which decision is against the title, right, privilege or immunity of said defendant, the present plaintiff in error, set up and claimed by it under the statute of the United States, in both said Court of Errors and Appeals and said Circuit Court of the County of Hudson.

And the Plaintiff in Error prays that the judgment aforesaid may be reversed, annulled and for nothing holden, and that said Court of Errors and Appeals be directed to enter a judgment in said cause, reversing and annulling the judgment of said Circuit Court of the County of Hudson.

VREDENBURGH, WALL & CAREY,
Attorneys of Plaintiff in Error.

Read on application for writ of error, the 12th day of August, 1915.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

377 [Endorsed:] 3200. Supreme Court of the United States. Michael Tonsellito, an Infant, Who Sues, &c., Def't in Error, vs. The New York Central and Hudson River Railroad Company, Pl't'ff in Error. On Writ of Error. Assignment of Errors. Vredenburgh, Wall & Carey, Att'ys of Pl't'ff in Error, 1 Exchange Place, Jersey City, N. J. Filed Aug. 14, 1915. Thomas F. Martin, Clerk.

378 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judge of the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey, possessors of the record of the proceedings and judgment in an action at law in which Michael Tonsellito, an infant, who sues by James Tonsellito, his next friend, is plaintiff-appellee, and the New York Central and Hudson River Railroad Company is defendant-appellants, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the Court of Errors and Appeals of the State of New Jersey, wherein final judgment upon return from the Circuit Court of the County of Hudson, in the State of New Jersey, was rendered on the eighteenth day of June, 1915, before you or some of you, said Court of Errors and Appeals being the highest court of law and equity of the said State of New Jersey in which a decision could be had in the action at law between Michael Tonsellito, an infant, who sues, etc., plaintiff-appellee, and The New York Central and Hudson River Railroad Company, defendant-appellant, (wherein was drawn in question certain acts of the said parties which would or would not constitute interstate commerce, and the decision was in favor of such acts constituting interstate commerce, and
379 against a right, privilege or immunity especially set up and claimed therein by said plaintiff in error under a statute of the United States), a manifest error hath happened to the great damage of The New York Central and Hudson River Railroad Company, as by its complaint appears. We being willing that that error if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment therein be given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, *which* of right according to the constitution, laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the twelfth day of August in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by—

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. Michael Tonsellito, an Infant, Who Sues, &c., Plaintiff-Defendant in Error, v

The New York Central and Hudson River Railroad Company, Defendant-Plaintiff in Error. Writ of Error. Returnable September 11, 1915. Vredenburgh, Wall and Carey, Attorneys for Plaintiff in Error, No. 1 Exchange Place, Jersey City, N. J. Filed Aug. 14, 1915. Thomas F. Martin, Clerk.

380 To the Honorable the Supreme Court of the United States:

MICHAEL TONSELLITO, an Infant, Who Sues by James Tonsellito, His Next Friend, Plaintiff, Defendant in Error,

vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant, Plaintiff in Error.

On Writ of Error.

Prayer for Reversal.

And now comes The New York Central and Hudson River Railroad Company, plaintiff in error, and prays for a reversal of the judgment of the Court of Errors and Appeals of the State of New Jersey, and the judgment entered in the Circuit Court, Hudson County, in said State, in the action brought by the above defendant in error against the above named plaintiff in error; and it also prays that the order of said Court of Errors and Appeals entered in the office of the Clerk of said Court on the eighteenth day of June, 1915, ordering that the judgment of the said Circuit Court be in all things affirmed, and that the record and proceedings be remitted to said Circuit Court to be proceeded with in accordance with said order and judgment and the practice of said Court of Errors and Appeals, be reversed, as well as the judgment of said Circuit Court entered by the Clerk of said Court on the fourth day of November, A. D. 1914.

VREDENBURGH, WALL & CAREY,
Attorneys for Plaintiff in Error,
No. 1 Exchange Place, Jersey City, N. J.

[Endorsed:] 3200. Supreme Court of the United States. Michael Tonsellito, an Infant, Who Sues by James Tonsellito, His Next Friend, Plaintiff-Defendant in Error, vs. The New York Central and Hudson River Railroad Company, Defendant-Plaintiff in Error. On Writ of Error. Prayer for Reversal. Vredenburgh, Wall & Carey, Attorneys of Plaintiff in Error, No. 1 Exchange Place, Jersey City, N. J. Filed Aug. 14, 1915. Thomas F. Martin, Clerk.

381 UNITED STATES OF AMERICA, *ss:*

To Michael Tonsellito, an Infant, Who Sues by James Tonsellito, His Next Friend, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the City of Washington, within thirty days from the date hereof, pursuant *of* a writ of error

filed in the office of the Clerk of the Court of Errors and Appeals in the last resort in all causes, of the State of New Jersey, wherein the New York Central and Hudson River Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this twelfth day of August in the year of our Lord one thousand nine hundred and fifteen.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

381½ [Endorsed:] 3200. Supreme Court of the United States. Michael Tonsellito, an Infant, Who Sues, &c., Defendant in Error, vs. The New York Central and Hudson River Railroad Company, Plaintiff in Error. On Writ of Error. Citation. Vredenburgh, Wall & Carey, Attorneys of Plaintiff in Error, No. 1 Exchange Place, Jersey City, N. J. Copy received of within citation — acknowledged this 16 day of August, 1915. Alex. Simpson, Attorney of Defendant in Error. Filed Aug. 16, 1915. Thomas F. Martin, Clerk.

382 State of New Jersey.

Department of State.

MICHAEL TONSELLITO, an Infant, Who Sues, etc., Respondent,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that on the Sixteenth day of August, A. D. Nineteen hundred and fifteen, a copy of the foregoing Citation was duly lodged in my office in Trenton, in the State of New Jersey.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Twenty-sixth day of August, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

383 State of New Jersey.

Department of State.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last

sort in all causes, do hereby certify that there was lodged with me s such Clerk, on August 16th, 1915, in the matter of Michael Tonellito, an infant, who sues, etc., Respondent, vs. The New York entral and Hudson River Railroad Company, Appellant;

1. The original Bond of which a copy is herein set forth.
2. Two copies of Writ of Error as herein set forth, one to file in ny office.
3. Original Assignment of Errors.
4. Prayer for Reversal.
5. Citation.
6. Petition for Writ of Error.

In testimony whereof, I have hereunto set my hand and affixed he Official Seal of said Court at Trenton, this Twenty-sixth day of August, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

384 State of New Jersey.

Department of State.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, nd ex-officio Clerk of the Court of Errors and Appeals in the last esort in all causes, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings, in the ase of Michael Tonsellito, an infant, who sues, etc., Respondent, vs. The New York Central and Hudson River Railroad Company, Appellant; and also the opinion of the Court rendered therein, as the ame now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Twenty-sixth day of August, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

385 State of New Jersey.

Department of State.

MICHAEL TONSELLITO, an Infant, Who Sues, etc., Respondent,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Appellant.

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record of the proceedings in the within entitled cause, with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Twenty-sixth day of August, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

386 Supreme Court of the United States.

MICHAEL TONSELLITO, an Infant, Who Sues, &c., by James Tonsellito, His Next Friend, Plaintiff, Defendant in Error,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant, Plaintiff in Error.

On Writ of Error from U. S. Supreme Court to the N. J. Court of Errors and Appeals.

Stipulation.

It is stipulated by and between the attorneys for the respective parties hereto that the printed State of the Case used on appeal in the Court of Errors and Appeals of New Jersey, in the above cause, may be used by the Clerk of said Court of Errors and Appeals in making return to the writ of Error from the Supreme Court of the United States in above cause, in so far as the records, pleadings, exhibits and other proceedings in said cause are contained therein.

August 30, 1915.

ALBERT C. WALL,
Attorney for Plaintiff in Error.
ALEX SIMPSON,
Attorney for Defendant in Error.

387 [Endorsed:] 624/24907. 3200. Supreme Court of the United States. Michael Tonsellito, an Infant Who Sues, &c., by James Tonsellito, His Next Friend, Plaintiff, Defendant in Error, vs. The New York Central and Hudson River Railroad Company, Defendant, Plaintiff in Error. On Writ of Error from U. S. Supreme Court to the N. J. Court of Errors and Appeals. Stipulation. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J. Filed Sept. 12, 1915. Thomas F. Martin, Clerk.

388 [Endorsed:] File No. 24907. Supreme Court U. S., October Term, 1915. Term No. 624. The New York Central & Hudson River R. R. Co., Pl'ff in Error, vs. Michael Tonsellito, an Infant, etc. Stipulation as to record to be sent up by Clerk of Court of Errors and Appeals. Filed October 11, 1915.

389 Supreme Court of the United States.

MICHAEL TONSELLITO, an Infant, Who Sues by James Tonsellito, His Next Friend, Defendant-in-Error,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plaintiff-in-Error.

On Writ of Error.

Statement.

To the Honorable the Supreme Court of the United States:

The plaintiff-in-error states that it intends to rely upon all the errors set forth in its Assignment of Errors. The parts of the record which it thinks necessary for the consideration thereof, and:

(1) Writ of error from the Supreme Court of the United States.
(2) Petition for writ of error.
(3) Assignment of errors.
(4) Prayer for reversal.
(5) Bond.
(6) Citation.
(7) Notice of appeal from Hudson Circuit Court.
(8) Grounds of Appeal.
(9) Complaint.
(10) Amendment to complaint.
(11) Answer.
(12) Reply.
(13) Judgment of Hudson Circuit Court.
(14) Certificate of Judge of Hudson Circuit Court.
(15) Testimony.
(16) Motion for non-suit.
(17) Motion to direct verdict.
(18) Judge's charge in Hudson Circuit.
(19) State of the case.
(20) Exhibits P-1 to P-4 inclusive.
(21) Exhibits D-1 to D-8 inclusive.
(22) Opinion of the Court of Errors and Appeals.
(23) Check list.
(24) Judgment of Court of Errors and Appeals.

Dated October 15, 1915.

ALBERT C. WALL,
Attorney for Plaintiff-in-Error.

[Endorsed:] 624/24907. Supreme Court ofthe United States. Michael Tonsellito, an Infant Who Sues by James Tonsellito, His Next Friend, Defendant-in-Error, vs. The New York Central & Hudson River Railroad Company, Plaintiff-in-Error. On Writ of Error. Statement. Service of a copy of the within Statement is hereby acknowledged this — day of ——, 1915. Copy received Oct. 16, 1915.

Alex. Simpson, Att'y, Def't in Error. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J.

390 [Endorsed:] File No. 24907. Supreme Court U. S., October Term, 1915. Term No. 624. The New York Central & Hudson River R. R. Co., Pl'ff in Error, vs. Michael Tonsellito, an Infant, etc. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed October 20, 1915.

391 Supreme Court of the United States.

No. 239.

MICHAEL TONSELLITO, an Infant, Who Sues, etc., Plaintiff, Defendant in Error,

vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant, Plaintiff in Error.

In Error to New Jersey Court of Errors and Appeals, Oct. Term, 1916.

No. 240.

JAMES TONSELLITO, Plaintiff, Defendant in Error,

vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant, Plaintiff in Error.

In Error to New Jersey Court of Errors and Appeals, Oct. Term, 1916.

Stipulation.

It is hereby stipulated by and between the attorneys of all the parties, that both of the above stated causes, which were tried together upon the same testimony in the trial court, and argued together upon the same record on appeal in the New Jersey Court of Errors and Appeals, may be likewise argued together upon one printed Transcript of Record in the Supreme Court of the United States, without requiring the printing of separate Transcripts of Record for such argument, the titles of both causes being set forth therein, together with the pleadings, decisions, judgments and other proceedings in each cause, and the testimony and exhibits, which pertain to both causes; and that the parts of the records mentioned in the following papers marked "Statement," shall constitute the parts of the records to be printed as the Transcript of Record for argument in these causes.

July 20, 1916.

ALBERT C. WALL,
Attorney for Respective Plaintiffs in Error.
ALEX. SIMPSON,
Attorney for Respective Defendants in Error.

[Endorsed:] Supreme Court of the United States. No. 624, Oct. Term, 1915. Michael Tonsellito, an Infant, Who Sues, etc., Plaintiff, Def't in Error, vs. The New York Central and Hudson River Railroad Company, Defendant, Pl't'ff in Error. No. 625, Oct. Term, 1915. James Tonsellito, Plaintiff, Def't in Error, vs. The New York Central and Hudson River Railroad Company, Defendant, Pl't'ff in Error. Stipulation, etc. Albert C. Wall, Att'y for Pl't'ffs in Error, 1 Exchange Place, Jersey City, N. J.

392 Supreme Court of the United States.

No. 239.

MICHAEL TONSELLITO, an Infant, Who Sues, etc., Plaintiff, Defendant in Error,

vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant, Plaintiff in Error.

In Error to New Jersey Court of Errors and Appeals, Oct. Term, 1916.

Statement.

To the Honorable the Justices of the Supreme Court of the United States:

The plaintiff in error states that it intends to rely on all the errors assigned; and that the parts of the record which it thinks necessary for the consideration thereof are:

1. Writ of Error from the Supreme Court of the United States; petition for writ; assignment of errors; prayer for reversal; bond, and citation.
2. Notice of Appeal from Hudson Circuit Court.
3. Grounds of Appeal.
4. Complaint.
5. Amendment to Complaint.
6. Answer.
7. Reply.
8. Judgment of Hudson Circuit Court.
9. Certificate of Judge of Hudson Circuit Court.
10. Testimony.
11. Stipulation.
12. Motion for Non-suit.
13. Motion to direct verdict for defendant.
14. Judge's charge in Hudson Circuit Court.
15. Defendant's requests to charge.
16. Defendant's exceptions.
17. State of the Case.
18. Exhibits.
19. Opinion of New Jersey Court of Errors and Appeals.

20. Judgment of New Jersey Court of Errors and Appeals.
21. Orders extending time for return of writ, etc.

Dated July 19, 1916.

ALBERT C. WALL,
Attorney of Plaintiff in Error.

[Endorsed:] Supreme Court of the United States. No. 624, Oct. Term, 1915. Michael Tonsellito, an Infant, Who Sues, etc., Plaintiff, Def't in Error, vs. The New York Central and Hudson River Railroad Company, Defendant, Pl't'ff in Error. Statement. Albert C. Wall, Att'y for Def't in Error, 1 Exchange Place, Jersey City, N. J. Service of a true copy of within Statement is acknowledged this 20th day of July, 1916. Alex Simpson, Att'y of Def't in Error.

393 Supreme Court of the United States.

No. 240.

JAMES TONSELLITO, Plaintiff, Defendant in Error,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant, Plaintiff in Error.

In Error to New Jersey Court of Errors and Appeals, Oct. Term, 1916.

Statement.

To the Honorable the Justices of the Supreme Court of the United States:

The plaintiff in error states that it intends to rely on all the errors assigned; and that the parts of the record which it thinks necessary for the consideration thereof are:

1. Writ of error from the Supreme Court of the United States petition for writ; assignmentof errors; prayer for reversal; bond, and citation.
2. Notice of Appeal from Hudson Circuit Court.
3. Grounds of Appeal.
4. Complaint.
5. Amendment to Complaint.
6. Answer.
7. Reply.
8. Judgment of Hudson Circuit Court.
9. Certificate of Judge of Hudson Circuit Court.
10. Testimony.
11. Stipulation.
12. Motion for Non-suit.
13. Motion to direct verdict for defendant.
14. Judge's charge in Hudson Circuit Court.
15. Defendant's requests to charge.

16. Defendant's exceptions.
17. State of the Case.
18. Exhibits.
19. Opinion of New Jersey Court of Errors and Appeals.
20. Judgment of New Jersey Court of Errors and Appeals.
21. Order extending time for return of writ, etc.

Dated July 19, 1916.

ALBERT C. WALL,
Attorney of Plaintiff in Error.

[Endorsed:] 239/24907. 240-16/24908. Supreme Court of the United States. No. 625, Oct. Term, 1915. James Tonsellito, Plaintiff. Def't in Error, vs. The New York Central and Hudson River Railroad Company, Defendant, Pl't'ff in Error. Statement. Albert C. Wall, Attorney of Pl't'ff in Error, 1 Exchange Place, Jersey City, N. J. Service of a true copy of within Statement is acknowledged this 20th day of July, 1916. Alex Simpson, Att'y of Def't in Error.

394 [Endorsed:] File Nos. 24907 & 24908. Supreme Court U. S., October Term, 1916. Term Nos. 239 & 240. New York Central & Hudson River R. R. Co., Pl'ff in Error, vs. Michael Tonsellito, etc. New York Central & Hudson River R. R. Co., Pl'ff in Error, vs. James Tonsellito. Stipulation as to printing record. Filed July 21, 1916.

Endorsed on cover: File No. 24,907. New Jersey Court of Errors and Appeals. Term No. 239. The New York Central & Hudson River Railroad Company, plaintiff in error, vs. Michael Tonsellito, an infant, who sues by James Tonsellito, his next friend. Filed September 9th, 1915. File No. 24,907.

Supreme Court of the United States.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error,
vs.
MICHAEL TONSELLITO, an Infant, Who Sues by JAMES TONSELLITO,
His Next Friend, Defendant in Error.

Stipulation.

It is hereby stipulated by and between counsel for the respective parties hereto, that the printed record in the United States Supreme Court in the above stated cause be amended by inserting in line 10, on page 6, after the word "in" and before the word "plaintiff" the following:

"charge of said locomotive, who did not give the"

so that said line will read as follows:

"further negligence of the person in charge of said locomotive, who did not give the plaintiff a reasonable opportunity, &c."

Dated December 4, 1916.

ALEX. SIMPSON,
Of Counsel with Defendant in Error.
ALBERT C. WALL,
Of Counsel with Plaintiff in Error.

[Endorsed:] 239/24907. Supreme Court of the United States. The New York Central & Hudson River Railroad Company, Plaintiff in Error, vs. Michael Tonsellito, an infant, who sues by James Tonsellito, his next friend, Defendant in Error. Stipulation. Albert C. Wall, of Counsel with Plaintiff in Error.

[Endorsed:] File No. 24907. Supreme Court U. S., October Term, 1916. Term No. 239. New York Central & Hudson River R. R. Co., P. E., vs. Michael Tonsellito, an infant, etc. Stipulation to correct record. Filed Dec. 16, 1916.

Office Supreme Court, U. S.
FILED
JAN 3 1917
JAMES D. MAHER
CLERK

Brief of Plaintiff in Error.

Supreme Court of the United States.

October Term, 1916.

No. 239.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

Plaintiff in Error,

vs.

MICHAEL TONSELLITO, an Infant, who sues by JAMES TONSELLITO, his next friend,

Defendant in Error.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

John A. Hartpence,
ALBERT C. WALL,
Attorneys and of Counsel with Plaintiff in Error.

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Supreme Court of the United States.

October Term, 1916. No. 239.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error,

vs.

MICHAEL TONSELLITO, an Infant, who sues by James Tonsellito, his next friend,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement of Case.

This is a proceeding on writ of error to the Court of Errors and Appeals of New Jersey (which is the highest court in New Jersey having jurisdiction of this cause), to review the judgment of that Court affirming on appeal the judgment of the Hudson County Circuit Court, rendered in favor of the plaintiff (the present defendant in error), and against the defendant (the present plaintiff in error), for $6,500. damages and $65.65 costs on November 4, 1914 (Record, pp. 8, 239).

The question involved is the liability of the plaintiff in error (hereinafter referred to as the defendant), to the defendant in error (hereinafter referred to as the plaintiff), under the Second Employers' Liability Act (35 Stat. at Large 65, chap. 149 Comp. Stat. 1913, Sec. 8567; 36 Stat. at Large 291, Chap. 143, Comp. Stat. 1913, Sec. 8567). The grounds upon which the defendant claims non-liability are:

1. Plaintiff and defendant were not engaged in inter-state commerce at the time of the occurrence of the injury complained of;

2. No negligence of the defendant which was the proximate cause of the injury, is shown;

3. Plaintiff's injury resulted from risks assumed by him;

4. Plaintiff was a mere volunteer at the time of the injury.

The manner in which the question is raised is:

An action for damages was brought in the Circuit Court of Hudson County, New Jersey, based upon the Federal Act above referred to alleging that plaintiff, an employe of defendant, was injured while engaged in inter-state commerce, through the negligence of defendant:

1. In constructing and maintaining its roadbed in an improper manner at the place where the accident to plaintiff occurred, and failure to warn plaintiff of hidden danger not obvious to him by reason of his youth and inexperience (Record, p. 5).

2. In starting the locomotive which plaintiff was about to board without giving him a reasonable opportunity to board the same (Record, p. 6).

At the conclusion of plaintiff's case, the defendant moved for a non-suit upon the following grounds:

1. The parties were not engaged in inter-state commerce at the time of the injury;

2. No negligence of defendant was shown.

3. The danger to plaintiff in attempting to board the engine at the place indicated was an obvious one to him, and he assumed the risk;

4. Plaintiff at the time of the injury was a mere volunteer (Record, pp. 87-89).

The non-suit was denied, and an objection to the Court's refusal to grant it was noted, which was the method of preserving the objection under the practice in that Court in New Jersey (Record, p. 89; P. L. 1912, p. 382, secs. 25, 26).

At the conclusion of the whole case a motion was made to direct a verdict in favor of defendant upon practically the same grounds which were urged in support of the motion for non-suit (Record, pp. 209-211). This motion was also denied, and the proper objection was noted (Record, p. 211).

The trial Court, although requested to so charge the jury, refused to charge as follows:

> 1. If the roadbed of the defendants at the place and time of the accident was similar in construction to the similar types of roadbed of other standard railroads in this locality, such as the Lehigh Valley Railroad, The Delaware, Lackawanna & Western Railroad and the Pennsylvania Railroad companies, and there was no greater distance from the roadbed itself to the top of the rails at the place and time of the accident than on such similar types of railroad, then no negligence can be attributed to defendant because of such distance then existing at such time and place of the accident.
>
> 3. If the jury believe that the condition of the defendant's roadbed at the time and place of the alleged injury to plaintiff, Michael Tonsellito, occurred (even though defective in the sense of the statute under which this action is brought, which of course is denied by defendant) was as plain and obvious to the said plaintiff as to the defendants and its agents, then plaintiff must be taken to have assumed the risks of his employment in this respect, and cannot recover against the defendant on that phase of this action.

Objections in due form were noted to the Court's refusal (Record, pp. 217-219).

On appeal to the Court of Errors and Appeals, the judgment of the Hudson Circuit Court was affirmed, which sustained the action of the trial court in refusing to non suit, refusing to direct a verdict in favor of defendant, and refusing to charge as requested, all of which rulings were specifically challenged in the appellate court (Record, pp. 2-4; 235-239).

The opinion of the New Jersey Court of Errors and Appeals, written by Mr. Justice Minturn, is found on pages 235-239 of the Record.

On June 14, 1915, judgment of affirmance was entered in the Court of Errors and Appeals (Record, p. 239).

On August 12, 1915, a writ of error from this Court issued to the New Jersey Court of Errors and Appeals (Record, p. 248).

The Facts.

On June 23, 1912, the plaintiff Michael Tonsellito was injured in the Granton Yard of defendant, located near Granton, New Jersey (Record, pp. 18, 133). At that time he had been working for defendant about a year and a half (p. 18). He was about seventeen years old (pp. 37, 73, 216); had worked both inside and outside the round-house, and was familiar with the portion of the yard where he met his injury (pp. 28, 29, 54). He was subject to the control of the Foreman of the round-house (pp. 34, 133, 134), and in the absence of the Foreman the Assistant Foreman had charge. He was known as a "wiper," (pp. 19, 134), and his duties were to clean engines and sometimes watch them when they were in the round-house or on the spurs just outside (p. 134). He also "pumped" the engines,—that is, kept the fires up and kept the water in the boilers (p. 20). Michael said he had often fired the engines (pp. 21, 57).

His usual noon-hour was from twelve to one. On the day of the accident he got on Engine 3791 at about twelve o'clock, noon (pp. 35, 152). The engine was in charge of Frederick Orr, the hostler, who was driving the engine

from the round-house, in the Granton Yard, to the store-house which was also located in the Granton Yard, about fifty feet away from the round-house, to get a barrel of oil (p. 152). He got the oil from the storehouse after the accident and went back to the round-house, reaching there about half past one (pp. 70, 156, 175). It was about half past twelve when Michael was hurt (pp. 35, 156). The barrel of oil was destined for Ravena, New York, and was apparently being transferred from the store-house at Granton to a store-house of defendant at Ravena (pp. 70, 71, 80, 81). Whether or not it ever was carried to Ravena, the testimony does not disclose. The engine was left at the round-house by Orr, and he testified that the barrel of oil was put on the back of the tank (p. 73).

Engine 3791 was taken by Engineman Gayman from Granton round-house to Weehawken, New Jersey, for Ravena, New York, drawing the Continental Limited at 2:38 that afternoon (p. 64). There is nothing in his evidence to show that the oil was on the engine or was carried by him to Ravena.

Michael rode with Orr on Engine 3791 from the round-house toward the store-house. To go from the one point to the other, it was necessary to go a considerable distance through the yard, and switch back to the store-house. Michael says that Orr told him to get on the engine and fire it for him (p. 21). Orr says he got on of his own accord (p. 138), and that he did not tell him to get off after he got on (p. 172). He denies that he directed him to fire for him (p. 167).

About five hundred feet south of the boiler-house (located near the store-house) is a switch (pp. 53, 111; 81, 163; Exhibits D-8, P-1, P-2, P-3, D-5). It is located on a slight fill, which was employed to give an inclined plane for the purpose of rising from the level of the yard to the level of store-house and boiler-house (pp. 30, 31, 47, 48, 76; Exhibits P-1, P-2 D-8).

Michael jumped from the engine at that switch to throw it, although McKee was riding on the pilot for that purpose (pp. 22, 170, 171). Orr did not know that he had

done so, and presumed that McKee would throw it (pp. 29, 30, 161, 170, 171). Orr did not know that Michael was about to board the engine until he saw him jump for it. Michael did not make known to Orr his intention of boarding the engine (pp. 29, 30, 36, 152, 177).

Michael said that when he turned the switch and went back to get on the engine, the engine was at a standstill, and the pilot was a foot or more south of the switch (pp. 32, 33, 34). Just as he was about to board the engine it started suddenly and threw him under the wheels (pp. 24, 32). At the point where he says he attempted to board, there was a cut in the embankment to accommodate a bend or bulge in a compressed air pipe that ran along the track. It was used in the ordinary conduct of the defendant's business to convey air from the boiler house to the machine shop, some distance southerly. The bulge rested on a large piece of timber which was sunk in the ground (Exhibits D-8, P-1, P-2).

The testimony adduced by plaintiff showed that there was a sharp descent at that point of over two feet, directly from the edge of the ties (pp. 24, 49, 51, 52; Exhibits D-8, P-1, P-2). Michael testified that he stood directly in this so-called "hole" as he was about to board the engine, and that it was so low that he could hardly reach the handles (pp. 18, 19, 23, 32, 33). He had to reach up four feet (p. 32).

As a result of the injury a portion of Michael's left foot was amputated (pp. 146, 84; Exhibit P-4), and it is because of this injury that he brought the suit.

Specification of Errors.

The assignments of errors are printed on pp. 245-247 of the Record.

Those relied upon are:

1. Because the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, erred in affirming the refusal of the Circuit Court of the County

of Hudson to grant a nonsuit against the plaintiff at the close of his case.

2. Because said Court of Errors and Appeals erred in affirming the refusal of the said Circuit Court, at the close of the whole case, to direct a verdict in favor of the defendant and against the plaintiff.

3. Because the said Court of Errors and Appeals erred in affirming the refusal of the said Circuit Court to find as a matter of law, that at the time of the alleged injury to the plaintiff, said plaintiff and defendant were not engaged in interstate commerce, within the provisions of the Federal Employers' Liability Act (35 Stat. at Large, 65, Chap. 149 U. S. Comp. Stat. Supp. 11, p. 1322).

4. Because said Court of Errors and Appeals erred in affirming the action of said Circuit Court in submitting to the jury for determination the question of whether or not said plaintiff and defendant were engaged in interstate commerce, within the provisions of said Federal Employers Liability Act at the time of the alleged injury to said plaintiff.

5. Because said Court of Errors and Appeals erred in affirming the action of the said Circuit Court in overruling the question propounded by defendant's attorney to the witness James Tonsellito, as follows:

"Q. How late did he work that day?"

6. Because said Court of Errors and Appeals erred in affirming the refusal of said Circuit Court to charge the jury, at the request of the defendant, as follows:

"If the roadbed of the defendants at the place and time of the accident was similar in construction to the similar types of roadbed of other standard railroads in the locality, such as the Lehigh Valley Railroad, The Delaware, Lackawanna & Western

Railroad and the Pennsylvania Railroad companies, and there was no greater distance from the roadbed itself to the top of the rails at the place and time of the accident than on such similar types of railroad, then no negligence can be attributed to defendant because of such distance then existing at such time and place of the accident."

7. Because said Court of Errors and Appeals erred in affirming the refusal of said Circuit Court to charge the jury, at the defendant's request, as follows:

"Plaintiff, Michael Tonsellito's damages in this case are limited to legal compensation for his pain and suffering, the testimony being undisputed that plaintiff was not emancipated at the time of his alleged injury, and there being no proof in the case of any interference with plaintiff's earning capacity in the future because of said injury."

8. Because said Court of Errors and Appeals erred in affirming the refusal of said Circuit Court to charge the jury at defendant's request, as follows:

"If the jury believe that the condition of the defendant's roadbed at the time and place of the alleged injury to plaintiff, Michael Tonsellito, occurred (even though defective in the sense of the statute under which this action is brought, which of course is denied by defendant) was as plain and obvious to the said plaintiff as to the defendant and its agents, then plaintiff must be taken to have assumed the risks of his employment in this respect, and cannot recover against the defendant on that phase of this action."

9. Because said Court of Errors and Appeals erred in affirming the action of said Circuit Court in ruling that there was evidence of defendant's negligence in the case, which should be submitted to the jury.

10. Because said Circuit Court should have directed a verdict at the close of the whole case, in favor of the defendant and against the plaintiff, on the ground that the clear weight of the evidence showed that the alleged injury complained of by plaintiff resulted from his own negligence and not from any negligence of the defendant; and that said Court of Errors and Appeals erred in affirming such action of said Circuit Court, in refusing to so direct.

11. That said Circuit Court erred in not directing a verdict at the close of the whole case, in favor of the defendant and against the plaintiff, on the ground that the alleged injury complained of by plaintiff resulted from a risk of his employment, which he assumed, and not from the negligence of the defendant, complained of by plaintiff; and that said Court of Errors and Appeals erred in affirming said action of said Circuit Court, in refusing to so direct.

12. Because said judgment of said Court of Errors and Appeals was against said defendant, the present plaintiff in error, whereas it should have been rendered in favor of said defendant, the present plaintiff in error, which decision is against the title, right, privilege or immunity of said defendant, the present plaintiff in error, set up and claimed by it under the statute of the United States, in both said Court of Errors and Appeals and said Circuit Court of the County of Hudson.

II.

Brief of the Argument.

A.

The Plaintiff Michael Tonsellito and Defendant were not engaged in interstate commerce.

Upon the plaintiff's theory, and assuming that the proof established it (which is denied by defendant), the parties were engaged in interstate commerce at the time of the injury to Michael because of the movement or operation of Engine 3791 from the round-house through Granton Yard to the storehouse, which was only fifty feet away from the storehouse, to obtain a barrel of oil which was to be carried from Granton, New Jersey, to Ravena, New York, on Engine 3791, when it should make its run, drawing the Continental Limited on its daily trip from Weehawken to Ravena or some other point in the State of New York.

Commerce means something more than the mere carrying of an article of personal property from one point to another. As was said by Mr. Chief Justice Marshall in *Gibbons* v. *Ogden,* 9 Wheat 1:

> "The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

One does not commerce with one's self; one does not traffic with one's self; one does not have intercourse alone; the very name implies others, between, among or together with whom, dealings are had. Commerce means an exchange of commodities. One does not exchange with one's self.

The transportation of a barrel of oil by the defendant, for its own use, from Granton, New Jersey, to Revena, New York, is not commerce. If it is, then it would be commerce to carry one's suitcase from Philadelphia to Atlantic City for one's accommodation on a week-end visit to the seashore resort. It may be an inter-state journey; it may be inter-state transportation of property; but it is not inter-state commerce.

And in order to bring the parties within the purview of the Federal Employers Liability Act both must have been engaged in inter-state commerce at the time of the injury complained of. That is the test adopted by this Court.

Ill. Cent. R. R. Co. v. *Behrens,* 233 U. S. 473; 58 L. Ed. 1051;
P. R. R. Co. v. *Knox,* 218 Fed. (C. C. A. 3rd) 748;
Mondou v. *N. Y., N. H. & H. R. R. Co.,* 223 U. S. 1, 56 L. Ed. 327;
Pederson v. *D. L. & W. R. R. Co.,* 229 U. S. 146, 57 L. Ed. 1125;
D. L. & W. R. R. Co. v. *Yurkonis,* 238 U. S. 439, 59 L. Ed. 1397;
Shanks v. *D. L. & W. R. R. Co.,* 239 U. S. 556; 60 L. Ed. 436;
C. B. & Q. R. R. Co. v. *Harrington,* 241 U. S. 177, 60 L. Ed. 941.

Minn v. U.S. R.R. Co. v. Winters 241 U.S. 188

But aside from that phase of the question, can it be said that Michael Tonsellito was engaged in inter-state commerce, even assuming, for the sake of the argument, that the carrying of the barrel of oil under the circumstances mentioned constitutes commerce?

The engine upon which Michael had been riding was being driven from the roundhouse in Granton Yard to the storehouse, located about fifty feet away from it. In order to reach the storehouse it was necessary to go over several switches and tracks, traversing a considerable portion of the yard. But the engine never left the yard for that purpose. Michael's business was to be in the roundhouse. He boarded this engine, according to his own story, for the purpose of firing it for the hostler who had it in charge. Take him at his word, and assume that he went with the engine at the direction of the hostler, and that the barrel of oil was procured from the storehouse, and later on carried to Ravena, in the State of New York, on that engine, when the engineer took charge of it and left Weehawken nearly two and a half hours after the accident to Michael. In what way did Michael further the instrumentalities of inter-state commerce so as to bring his act within the scope of the statute? At the most, his connection with it was limited to its carriage from the storehouse back to the roundhouse, where it was left awaiting further disposition. There is nothing in the evidence to show that Michael in any way prepared or furthered or was engaged in furthering any specific agency of inter-state commerce.

B.

Defendant was not negligent.

At the point of the accident there was a fill in the yard for the purpose of running from level up to the storehouse and boilerhouse. There was no evidence by plaintiffs to show that this was not a normal fill. There was no standard established by their testimony for such an operation, of which this fell short. It is not competent for the jury to fix a standard of its own, and then say defendant fell short of it. It is proper construction when suited to its avowed purpose.

Zebrowski v. *Warner Sugar Ref. Co.*, 83 N. J. L. 558;
Fed v. *W. J. & S. S. R. R. Co.*, 77 N. J. L. 502;
Dotson v. *Erie R. R. Co.*, 68 N. J. L. 679;
Foley v. *Bruns. Cons. Co.*, 66 N. J. L. 637.

According to Michael's testimony, the engine started just as he was about to board it, and it threw him. But there is nothing in the testimony to show that the engineman knew that Michael was there and about to board the engine, and started it in disregard of Michael's safety. How then could it be said to be negligent?

At the close of plaintiffs' case, therefore, it is difficult to see what there was to put the defendant to its defense in this respect. Plaintiffs' own exhibits (P-1, P-2, and P-3) speak most strongly against them.

Wyckoff v. *Birch*, 76 N. J. L. 653.

At the conclusion of the whole case the testimony showed that when Engine 3791 reached the last switch it stopped with the front end of the pilot south of the switch.

Michael Tonsellito, about a foot (Record, pp. 33, 41, 42).
Eiler, near mouth of switch (pp. 52, 53).
Wendt, 2 or 3 feet (pp. 59, 60).
McKee, 2 to 5 feet (p. 97).
Orr, 6 to 10 feet (pp. 155, 163, 171, 172).

Indisputably, then, the full length of the engine must have been south of the switch. By actual measurement the distance from the front end of the pilot to the step between the cab and tender or tank is 40 or 41 feet.

(Kramer, p. 179; Fuchs, p. 178).

According to Michael's own testimony the engine was at a standstill as he reached up for the handles, and when it started and threw him it moved but a few feet. It

seems irrefutable, therefore, that when Michael attempted to board the engine he was between 35 and 45 feet south of the switch,—and that is about the point indicated by Orr (p. 145).

By reference to the blue print prepared by Kraemer (Exhibit D-5), and Kraemer's testimony (Case, p. 110, &c.) this measurement is confirmed. Reference to the Exhibits P-1, P-2, P-3, D-8, and D-5, and the testimony of Mahlbech (pp. 47, 48), it will be seen that the bulge in the air pipe was between 16 and 20 feet south of the switch. That is the point at which Michael said he attempted to board the engine.

At the point where the actual measurements show he *must have been*, the roadbed is shown to be in the best of condition; even better than the other three standard roads (Kraemer, pp. 110, &c.; Exhibits P-1, P-2, P-3, D-5, D-8). Furthermore, there is no testimony complaining of it there. The only point complained of is the "hole" about 20 feet south of the switch, which is not shown to be unnecessary or improper.

If Michael *did* attempt to board the engine at that point(pp. 22, 23), fixed by the bulge in the air-pipe, then the engine must have moved 15 or 20 feet before the steps reached him. This is in accord with his testimony when he said that the engine was moving four or five miles an hour when he attempted to board it (p. 27) and this is precisely what he said occurred, on three occasions subsequent to the injury:

(1) To Dr. Poole (Exhibit P-5).

(2) To Miss Tully, (Exhibit D-4).

(3) To the stenographer Mulcox (Exhibit D-6).

Under such circumstances, no negligence could be imputed to defendant.

On the other hand, if he attempted to board the engine at the point fixed by the testimony of Orr and the mathematical measurements, no negligence is attributable to the defendant, because the roadbed at that point was in normal condition, and there was no allegation or proof otherwise.

It was upon this theory of non-liability of the defendant that the provisions of the Practice Act of 1912 (P. L. 1912, page 397, Rule 70)*, were invoked, in order to have the jury find as a matter of fact at what place Michael attempted to board the engine (p. 220). It seems to defendant that whichever way the question is answered, the plaintiff is out of court.

The jury, however, failed to return a specific answer to the question, and thus in a measure nullified defendant's effort to have the point fixed definitely; but the colloquy of court and jury, together with the prominence given the bulge in the air-pipe, throughout the case, would doubtless sustain the court's view that it was the "loop or bend" in the air-pipe which the jury had in mind when it answered the question to the effect that they found that he attempted to board the engine "at the air-pipe" (pp. 232-234).

C.

Plaintiff assumed the risk.

But, plaintiffs say, how about the hole in which Michael stood just as he was about to board the engine? Well, that is not shown to be negligent construction. On the contrary, it shows clearly to have been occasioned by the location of the bend in the air pipe, which was supported by the timber sunk in the ground at that point (Exhibits D-8, P-1, P-2).

Furthermore, Michael was as capable of forming an intelligent judgment of the presence of this excavation

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*"70. The court may request the jury to return answers to written questions embracing the disputed facts in issue and the amount of damages. The questions and answers shall be entered upon the minutes and the court may enter a general verdict. In case of a rule to show cause for a new trial, or an appeal, a statement of the case, including the questions and answers, shall be prepared and filed and shall have the effect of a special verdict. In considering the case upon review, the court may draw inference of fact."

and its danger as a place from which to board the engine as was the defendant, perhaps better. He was seventeen years of age. He had worked about the yard for a year and a half, passing that point every day. He was no fool, despite the efforts of his counsel to create that impression in the minds of the jury when he was upon the witness stand. A boy of seventeen who for a year and a half has survived the environment of a railroad yard such as the yard at Granton has had his wits pretty keenly sharpened. If there was any defect in the roadbed at the point complained of, it was perfectly obvious to Michael. If there was any danger at that point, it was perfectly obvious to him, also. The idea that the defendant should have taken Michael to that point and said to him, "Now, Michael, it is dangerous to attempt to board an engine, whether moving or at rest, from this excavation, because it is too deep for you to reach the handles and steps from," is so absurd that its mere statement demonstrates its absurdity.

Whatever risk was present, he assumed; and the Court should have so directed.

Tuttle v. *Ry. Co.*, 122 U. S. 189; 30 L. Ed. 1114;
Kohn v. *McNulta*, 147 U. S. 238; 37 L. Ed. 150;
So. Pac. Co. v. *Seley*, 152 U. S. 145; 38 L. Ed. 391;
Seaboard Air Line v. *Horton*, 233 U. S. 492; 58 L. Ed. 1062;
Jacobs v. *Southern Ry. Co.*, 241 U. S. 229; 60 L. Ed. 970.

The mere fact that he was not of full age is not sufficient to excuse him from the operation of the rule. A servant assumes the risk of that which is obvious.

Riddle v. *Alpha Cement Co.*, 73 N. J. L. 594;
Caffrey v. *Hedden*, 79 N. J. L. 557;
Peterson v. *Am. Ice Co.*, 83 N. J. L. Vr. 579.

And the rule is the same even though he be under age. Instruction is only necessary where the risk is not obvious.

Bender v. *Glucose Co.*, 72 N. J. L. 218 (Age 17 years);
Carrington v. *Mueller*, 65 N. J. L. 244 (Age 13 years);
Smith v. *Irwin*, 51 N. J. L. 507 (Age 17 years);
Diehl v. *Standard Oil Co.*, 70 N. J. L. 424 (Age 14 years);
Beckham v. *Hillier*, 47 N. J. L. 12 (Age 16 years);
Dunn v. *McNamee*, 59 N. J. L. 498 (Age 19 years).
Hesse v. *Natl. Casket Co.*, 66 N. J. L. 652 (Age 16 years).

Michael left a place of safety and voluntarily went into danger.

Harris v. *S. S. Co.*, 75 N. J. L. 861;
Haber v. *Rubber Co.*, 72 N. J. L. 171.

D.

Plaintiff Was a Volunteer.

It was the noon hour (Record, p. 61). It was time for Michael to stop work. He was on his way to have his ticket punched when he got on the engine (p. 39). The witnesses Eiler and Wendt were eating their lunches at the time the accident happened (pp. 53, 59). James Tonsellito said he had been working since four o'clock that morning and that he was through. He was not permitted to state what time Michael got through (p. 77). It was a relevant question, so far as defendant is concerned, for it went to the root of whether or not Michael was through work at that time and were merely hanging around indulging in unrequired pursuits. It also went to sustain the hostler's statement that Michael got on the engine of his own accord. It was error to exclude it.

E.

There was not sufficient evidence of negligence of defendant to go to the jury, and a verdict should have been directed in favor of defendant.

Impt. Co. v. *Munson,* 14 Wall. 442, 448; 20 L. Ed. 867;
Pleasants v. *Fant,* 22 Wall. 116; 22 L. Ed. 780;
Baldwin v. *Shannon,* 43 N. J. L. 596.
St. L. etc. R. R. Co. v. *McWhirter,* 229 U. S. 265; 57 L. Ed. 1179;
Roberts' "Injuries Interstate Employees," (1915) pp. 15, 16.

F.

The judgment of the Court of Errors and Appeals and of the Circuit Court of Hudson County, New Jersey, should be reversed, set aside and for nothing holden.

St. Louis Ry. Co. v. *McWhirter,* 229 U. S. 265; 57 L. Ed. 1179;
Norf. Sou. R. R. Co. vs. *Ferebee,* 238 U. S. 269; 59 L. Ed. 1303;
C. R. I. & P. Ry. Co. v. *Devine,* 239 U. S. 52; 60 L. Ed. 140;
Southern Ry. Co. v. *Prescott,* 240 U. S. 632; 60 L. Ed. 836;
Cin. etc. R. R. Co. v. *Rankin,* 240 U. S. 319; 60 L. Ed. 1022.

Respectfully submitted,
John K. Wappence, and
ALBERT C. WALL,
of counsel with Plaintiff in Error.

FILED
JAN 22 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916
No. 239

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY

Plaintiff in Error

vs.

MICHAEL TONSELLITO, an infant, who sues, etc.,

Brief of Defendant in Error

ALEXANDER SIMPSON
Attorney for Defendant in Error

THE ARTHUR H. CRIST CO., Cooperstown, N. Y.
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Supreme Court of the United States

OCTOBER TERM, 1916

No. 239

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error, vs. MICHAEL TONSELLITO, an infant, who sues, etc., Defendant in Error.	Error to the Court of Errors and Appeals of the State of New Jersey.

BRIEF OF DEFENDANT-IN-ERROR

Statement of Facts

The statement of facts contained in the brief of the plaintiff in error is substantially correct except that there is an omission of the following facts:

That the plaintiff was keeping up steam in an engine, which engine was to be used and was immediately thereafter used in pulling a train from Weehawken, New Jersey, to Ravena, New York, carrying passengers, (pp. 21-22; pp. 27-36-65) in addition to being at work in getting a barrel of oil to be used also in the same commerce. Plaintiff threw two switches before he went to the third switch (pp. 22-23). Oil was to be taken from storehouse at Granton, N. J., to Ravena, N. Y. (p. 71). Plaintiff was told by his superior to obey Orr (p. 26). Plaintiff had often fired engines to knowledge of superiors (pp. 57-58). There was evidence that Orr knew that Michael was off the engine to throw the switch (pp. 22-23).

Brief of the Argument

A

Plaintiff and defendant were engaged in interstate commerce.

The jury could have found from the evidence that the defendant was a common carrier by railroad engaged in transporting freight and passengers from Weehawken, in the State of New Jersey into the State of New York, at the time of the accident and that the plaintiff was employed as enginewiper and general utility boy around engines, cleaning headlights, firing the engine, etc., in the roundhouse at Granton, near Weehawken. That on the day of the accident he was keeping up steam on this engine, at the request of the hostler, who was his superior and was going for a barrel of oil which would also be used on engines engaged in interstate commerce.

If found by the jury, that the plaintiff was engaged in keeping up the steam in an engine which would be taken to its usual place and immediately thereafter annexed to a train and be used in pulling said train to the State of New York from the State of New Jersey, can it be said, keeping up steam in such an engine is a matter of indifference to interstate commerce, or could it be said the matter of getting oil for such engine is a matter of indifference to interstate commerce? If it was not a matter of indifference to interstate commerce, *Pedersen vs. D. L. & W. Railroad,* 229 U. S., 146, 57 Law. Ed., p. 1125, then both the plaintiff and the defendant were engaged in interstate commerce at the time of the accident, and this question the Court of Errors and Appeals in the State of New Jersey said answered itself. See cases collected in note to *Lamphere vs. Oregon Railroad Navigation Co.,* in Lawyers Reports, Annotated, (N. S.) vol. 47, p. 52, subtitle 7 and note.

It is the argument of the plaintiff in error on page 11, that the employee must be in direct contact with a passenger or piece of freight to make him an employee in interstate commerce. It is true one does not "commerce" with oneself, one "commerces" with others, yet one needs employees to aid one in "commercing," in doing commerce with others. And if the employees are obtaining oil for an interstate engine and keeping up steam in an interstate engine, it is no more removed from interstate commerce than employees taking bolts to a bridge. Circumstancial evidence showing grounds of probability rather than certainty is all that is necessary to make a jury question. *Austin v. P. R. R.*, 81 Atl. R., 739; 82 N. J. L., 416.

B

Negligence of defendant.

The defendant's negligence was for the jury The jury might have found that the plaintiff was injured by reason of two distinct sets of facts.

1. That the person in charge of the engine while he knew or should have known that the plaintiff was in the vicinity of the engine, he, the person in charge of the engine having directed the plaintiff to get off and throw the switch and having had the engine at a standstill waiting for the switch to be thrown, carelessly started the engine without observing or using any care to ascertain the whereabouts of the plaintiff or without using any care to see whether the plaintiff had reasonable opportunity to board the said engine and so threw the plaintiff under the engine.

2. At the place where the plaintiff was boarding the engine, the ground was so much lower than the rails, that the act of precipitately starting the engine was rendered more dangerous than it would have been ordinarily.

Whether under these circumstances the fellow servant

of the plaintiff was negligent in starting the engine or whether the defendant was negligent in so maintaining its roadbed, were questions for the jury which were determined adversely to the defendant, the plaintiff in error.

The plaintiff's testimony shows that the person in charge of the engine has sent him to throw the switch and should have known that the plaintiff was off the engine and was bound to use reasonable care to see the plaintiff had a reasonable opportunity to get on the engine.

As to the argument about the different measurements of the engine and the switch and the places around the switch and the loop in the water pipe, these of course, are all arguments for the jury but there was direct and positive testimony by the plaintiff as to where the engine was when he was hurt. Whether his testimony agrees with the measurements was for the jury. There was evidence from which the jury might have found that the person in charge of the engine started the engine without giving plaintiff reasonable opportunity to board the train and the person in charge of the engine knew, or should have known, that the plaintiff was off the engine; that the roadbed at the point of the accident was carelessly constructed. This would warrant the jury in finding negligence. All the argument of the plaintiff on page 14 as to contradictory statements of the plaintiff, is simply as to weight of testimony which was proper for the consideration of the jury but not for this court on writ of error. Negligence it is respectfully submitted was for the jury. *Kreigh vs. Westinghouse Co.*, 220 U. S., p. 249.

C

Risk.

Whether the plaintiff assumed the risk was for the jury. The question of assumption of risk was submitted

by the Court to the jury and resolved against the defendant, the plaintiff in error. Although the plaintiff might have known of the physical situation at the water pipe—yet if he did know of the physical situation, there must be proof that he knew or should have known of the danger. Being an infant, it was for the master to explain to him any dangers which were not apparent to one of his age and experience. It is not whether the plaintiff knew the physical situation, but whether he appreciated the danger or should have done so.

Polo vs. Palisades Construction Co., 70 Atl., 161; 75 N. J. L., 873.
Burns v. Telegraph Co., 70 N. J. L., 745.
Seaboard v. Horton, 223 U. S., 503.

But, assume for the sake of argument, that he is charged as a matter of law with the obvious risk of this physical situation, was he charged as a matter of law with the obvious risk of something which he could not know—that the person in charge of the engine would start the engine without giving him a reasonable opportunity of boarding the same? How can he assume the risk of the negligence of the master or a fellow servant, which is not apparent to him?

Ches. & O. R. R. vs. DeAtley, 241 U. S., 310.
Grybowski v. Erie R. R. Co., 95 Atl. R., 764.
Seaboard vs. Horton, 223 U. S., 503.

There is no specification of exceptions to the Court's charge on the subject of risk. What the plaintiff in error argues is that the verdict should have been directed as a matter of law on assumption of risk. The instruction asked is that if the physical situation was plain, the risk was assumed, which is not the law. It must not only be the physical situation but the danger. As an infant he did not assume the risk that an adult would assume. *Smith v. Irwin*, 51 N. J. L., 507.

D

Not a volunteer.

Whether or not the plaintiff was a volunteer, was at best, a jury question. The work which he was doing, under his testimony, he had often done before. He was under the direction of such persons as the man in control of the engine. He had often fired engines before and it cannot be said as a matter of law that he was a volunteer. Whether he was or not, under the facts in this case is a jury question.

As a resumé of many cases on the subject, Labatt on Master and Servant, says:

> "The scope of the servant's duties in relation to the rule illustrated by the cases cited in the last section, is determined by what he was employed to perform and by what, with the knowledge and approval of his employer he actually did perform, rather than by the mere verbal designation of his position. The question whether the injured person was acting in the course of his employment is for the jury where the evidence is conflicting or where a difference of opinion may reasonably be entertained with regard to the proper inference to be drawn from the testimony."

Labatt on Master & Servant, Volume 1, page 1864, and cases cited.

There is ample evidence that the work that he was then doing, that is, firing engine, was work that he had often done notoriously in the presence and with permission of his superiors and that he had before the accident been under the control of hostlers. Therefore, the argument of the plaintiff in error that it was a court question as to whether he was a volunteer is plainly against the cases collected in Labatt on Master & Servant, as to volunteer.

There is a further consideration, that the act under which this suit was brought has been construed by this court in *Zachary vs. No. Carolina R. R. Co.*, 232 U. S., 248; 58 Law Ed., 591, as placing an employee under the protection of this act when "on duty," in interstate commerce, so that whether or not he was on duty under these facts would be a jury question and not a court question.

It is respectfully submitted that the judgment below should be affirmed. *Richie Federal Employers Liability*, Second Edition, pars. 44 and 52.

ALEX. SIMPSON.
Attorney for Defendant in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 240.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES TONSELLITO.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

FILED SEPTEMBER 8, 1915.

(24,908)

(24,908)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 240.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

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a-361 New Jersey Court of Errors and Appeals, June Term, 1915.

On Appeal from Hudson Circuit Court.

Between JAMES TONSELLITO, Respondent,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Order on Affirmance of Judgment.

This cause having been duly argued at the March Term, 1915, of this court by Messrs. Vredenburgh, Wall & Carey, of counsel for the appellant, and Alexander Simpson, Esq., of counsel for the respondent, and the court having considered the same, and finding no error in the record or proceedings in the Circuit Court—

It is thereupon, on this Fourteenth day of June in the year of our Lord one thousand nine hundred and fifteen, ordered and adjudged that the judgment of the Hudson Circuit Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Hudson Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

ALEX. SIMPSON,
Attorney for Respondent.

[Endorsed:] New Jersey Court of Errors and Appeals. June Term, 1915. James Tonsellito, Respondent, vs. The New York Central and Hudson River Railroad Company, Appellant. On Appeal from Circuit Court. Order Affirming Judgment. Alex. Simpson, Att'y. Filed Jun- 18, 1915. Thomas F. Martin, Clerk.

362 Supreme Court of the United States.

JAMES TONSELLITO, Plaintiff-Defendant in Error,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant-Plaintiff in Error.

Petition for Writ of Error.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of The New York Central and Hudson River Railroad Company respectfully shows:

1. That the plaintiff in error is a railroad corporation of the State of New York, and, at the time of the occurrence complained of in this suit, was the lessee and operator of a railroad extending from

Weehawken, Hudson County, New Jersey, to Ravena, Albany County, New York, and beyond.

2. Defendant in error is the father of Michael Tonsellito, an infant, who was employed by plaintiff in error at the round-house in Granton Yard, near Weehawken aforesaid, and who was injured on June 23rd, 1912, while attempting to board an engine at a switch near the store-house in said yard.

3. The engine was in charge of Orr, a hostler, who was on his way from the round-house to the store-house, to procure a barrel of oil which was the property of the plaintiff in error, and which was to be carried to Ravena aforesaid, for the plaintiff in error.

363 4. Michael Tonsellito, the infant son of the Defendant in error, rode with Orr on the engine from the round-house on the way to the store-house. To reach that point it was necessary to travel some distance through the yard, switching back to the store-house. One McKee was riding on the pilot of the engine to turn the switch, but Michael left the engine without Orr's knowledge and essayed to turn it. As a result of the aforesaid accident, while attempting to board the engine, a portion of Michael's left foot was amputated.

5. Suit for damages under the Federal Employers' Liability Act was instituted in the Hudson County Circuit Court, in the State of New Jersey, for loss of Michael's services during the period of incapacity and during minority. Judgment was entered in favor of defendant in error for $1,000. This judgment was affirmed by the Court of Errors and Appeals of New Jersey, which is the court of last resort in said State, in all causes, and the highest court exercising civil jurisdiction.

6. There was no testimony in the case to show what was to be done with the oil when it reached Ravena, nor whether the barrel of oil was carried beyond Granton Yard. At the trial, plaintiff in error moved for nonsuit and a verdict in its favor, on the grounds that:

(1) Michael Tonsellito and defendant were not engaged in interstate commerce at the time of the injury complained of, and hence the court was without jurisdiction, the father's rights under the act being no greater than the son's.

(2) No negligence was shown on the part of the plaintiff in error.

(3) Michael assumed as a risk of his employment the danger incident to boarding the engine.

(4) No right of recovery is afforded the father under the Federal Act for injuries to an infant son, unless the injury result in death, and said Act supersedes all other rights of action.

364 Both motions were decided adversely to the plaintiff in error, and were therefore decisions against the right or immunity from suit to which plaintiff in error was entitled under the Federal Statute upon which the suit was based. The Court of Errors and Appeals decided against this right or immunity, in affirming the judgment below, in a proceeding in which was claimed by plaintiff in error a right, privilege or immunity, under a statute of the United States and which had been denied by the decision of the Hudson County Circuit Court, upon which statute said action was

based, which said decision of said Court of Errors and Appeals thus affirming the judgment of the Hudson County Circuit Court, is against such right, privilege or immunity.

Wherefore, your petitioner prays the allowance of a writ of error directed to the Court of Errors and Appeals of the State of New Jersey, in the last resort in all causes, being the possessor and custodian of the proceedings and judgment in this action, commanding that the said record and proceedings in said action be sent by said Court of Errors and Appeals of the State of New Jersey, to the Supreme Court of the United States, with all things concerning the same, and for citation, to the end that the errors complained of in the Assignment of Errors herewith filed by said petitioner, may be reviewed, and if error be found, that the same may be corrected conformably to the Constitution and Laws of the United States.

VREDENBURGH, WALL & CAREY,
Attorneys of Petitioner and Plaintiff in Error,
1 *Exchange Place, Jersey City, N. J.*
ALBERT C. WALL, *Of Counsel.*

365 STATE OF NEW YORK,
County of New York, ss:

Edward L. Rossiter, of full age, being duly sworn, on his oath deposes and says:

I am the Treasurer of the petitioner within named, and as such am familiar with the matters in said petition set forth. The foregoing petition is true to the best of my knowledge, information and belief.

E. L. ROSSITER.

Subscribed and sworn to before me this 5th day of August, A. D. 1915.

JAMES IRELAND,
Notary Public, New York County.

Cert. filed in Bronx & West. Cos.; Bronx Co. No. 1; Bronx Reg. No. 703.

[Seal James Ireland, Notary Public, New York County.]

O. K.
J. I.

Read on application for writ of error this 12th day of August, A. D. 1915.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

366 [Endorsed:] 3199. Supreme Court of the United States. James Tonsellito, Plaintiff-Defendant in Error, vs. The New

York Central and Hudson River Railroad Company, Defendant-Plaintiff in Error. Petition for Writ of Error. Vredenburgh, Wall & Carey, Attorneys for Plaintiff in Error, 1 Exchange Place, Jersey City, N. J. Filed Aug. 14, 1915. Thomas F. Martin, Clerk.

367 Know all men by these presents, that the undersigned, The New York Central Railroad Company, successor to The New York Central and Hudson River Railroad Company, a corporation organized under the laws of the State of New York, as principal, and The Nation Surety Company of New York, a corporation authorized to do business in the State of New Jersey, as surety, are held and firmly bound unto James Tonsellito, in the just and full sum of five hundred dollars ($500), to be paid to the said James Tonsellito, his certain attorneys, heirs, executors, administrators or assigns, to which payment well and truly to be made, said corporations bind themselves, their successors, representatives and assigns, jointly and severally by these presents.

Whereas, lately in the Court of Errors and Appeals, in the last resort in all causes in the State of New Jersey, in a suit pending in said Court, between James Tonsellito, plaintiff-appellee, and The New York Central and Hudson River Railroad Company, defendant-appellant, judgment was rendered against said New York Central and Hudson River Railroad Company and in favor of said Plaintiff-appellee, affirming a judgment of the Circuit Court of Hudson County in the State of New Jersey, entered in said Circuit Court in favor of said James Tonsellito and against said New York Central and Hudson River Railroad Company, which Company being about to apply for a writ of error to the Supreme Court of the United States to reverse the judgment in said suit and for the issuing of a citation directed to said James Tonsellito, citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington in the District of Columbia,

368 Now, therefore, the condition of the above obligation is such that if said New York Central and Hudson River Railroad Company shall prosecute its writ to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed with the seals of said corporations and dated this fifth of August, 1915.

NEW YORK CENTRAL RAILROAD COMPANY, SUCCESSOR TO NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[SEAL.] By A. H. SMITH, *President.*

Form approved.
A. S. C.

Attest:
E. F. STEPHENSON,
Ass't Secty.

THE NATIONAL SURETY COMPANY
OF NEW YORK,
By FRANK W. STUCKY,
Res. Vice-President.

Attest:
M. O'LEARY,
Resident Assistant Secretary. [SEAL.]

The foregoing bond for costs is satisfactory as to form, amount and the sufficiency of the surety thereon.

ALEX. SIMPSON,
Attorney of Deft. in Error.

Approved:
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

369 STATE OF NEW JERSEY,
County of Hudson, City of Jersey City, ss:

On this 5th day of August, 1915, before me, the subscriber, an Attorney at Law duly commissioned and sworn, personally came M. O'Leary who, being by me duly sworn, on his oath, saith; that he is the Res. Ass't Sec'y of the National Surety Company of the State of New York, and that he resides in the City of Jersey City that he knows Frank W. Stucky, Resident Vice-President of the National Surety Company, and he knows too, the corporate seal of the said Company; that the seal affixed to the foregoing instrument is such corporate seal; and it was affixed by the said R. V. P. and the said instrument signed by the said R. V. P. as R. V. P. of said Company, attested by deponent as R. A. S. by order of the Board of Directors of said Company in deponent's presence as the voluntary act and deed of said Company, that said Company has duly complied with all the requirements of Chapter 134 of the Laws of the State of New Jersey of the year 1902; that the good avai-able assets of the Company exceed its liabilities, as such liabilities are ascertained in the manner provided in said Chapter; that the National Surety Company is duly incorporated under the laws of the State of New York; and is authorized by the laws of that State and under its charter to become surety on bonds and obligations such as are mentioned in said Chapter; and has *no* deposit with the Superintendent of Insurance of the State of New York, good securities worth at par and at market value at least Two Hundred Thousand Dollars ($200,000) held for the security of its obligations and has a fully paid up, safely invested, and unimpaired capital of Two Million

Dollars; and said Company has appointed the Commissioner
370 of Banking and Insurance of New Jersey and his successor in office as its true and lawful Attorney in the State of New Jersey, upon whom process of Law can be served, and has filed in the office of the Commissioner of Banking and Insurance, a written instrument duly signed and sealed, certifying such appointment, together with the residence and office of such Attorney, within the State of New Jersey; and that the following is a true copy of a By-Law duly adopted by the Board of Directors of the said National Surety Company on the 6th day of February, 1912, at a regular Meeting, to wit:

Article XIII.

Section 1. Signatures required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, shall be signed by the President, a Vice-President, a Resident Vice-President, or Attorney-in-Fact, and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated, or not, and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated or not; and the Attorneys-in-Fact shall each have authority, in the discretion of such Attorneys-in-Fact, to affix to such instruments an impression of the Company's seal, whether the Secretary be absent or incapacitated, or not, or to attach the individual seal of the Attorney-in-Fact thereto, or to use the scroll of the Attorney-in-Fact or a wafer, wax, or other similar adhesive substance affixed thereto or a seal of paper or other similar substance affixed thereto by
371 by mucilage, or other adhesive substance, or use the word "seal" or the letters "L. S." opposite the signature of such Atorneys-in-Fact, as the case may be.

M. O'LEARY,
Resident Assistant Secretary.

Sworn and subscribed in the City of Jersey City in the County of Hudson and State of N. J. this 5th day of August, A. D. 1915, before me an Attorney at Law duly commissioned and sworn.

JULIUS J. SEIDEN,
Attorney at Law of N. J.

[Endorsed:] 3199. Supreme Court of the United States. James Tonsellito, Plaintiff, Defendant in Error, vs. New York Central & Hudson River Railroad Company, Defendant, Plaintiff in Error. On Writ of Error. Bond for Costs. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J. Filed Aug. 1, 1915. Thomas F. Martin, Clerk.

372 Supreme Court of the United States.

JAMES TONSELLITO, Defendant in Error,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error.

On Writ of Error.

Assignments of Error.

To the Honorable the Justices of the Supreme Court of the United States:

And now comes The New York Central and Hudson River Railroad Company, the plaintiff in error, and makes and files this, its assignment of errors:

There is manifest error in the record and proceedings herein:

1. Because the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, erred in affirming the refusal of the Circuit Court of the County of Hudson to grant a nonsuit against the plaintiff at the close of his case.

2. Because said Court of Errors and Appeals erred in affirming the refusal of the said Circuit Court, at the close of the whole case, to direct a verdict in favor of the defendant and against the plaintiff.

3. Because the said Court of Errors and Appeals erred in affirming the refusal of the said Circuit Court to find as a matter of law, that at the time of the alleged injury to Michael Tonsellito, the plaintiff's infant son, said Michael Tonsellito, and defendant were
373 not engaged in interstate commerce, within the provisions of the Federal Employers' Liability Act (35 Stat. at large, 65, Chap. 149 U. S. Comp. Stat. Supp. 11, p. 1322).

4. Because said Court of Errors and Appeals erred in affirming the action of said Circuit Court in submitting to the jury for determination the question of whether or not said Michael Tonsellito, plaintiff's infant son, and defendant, were engaged in interstate commerce, within the provisions of said Federal Employers' Liability Act, at the time of the alleged injury to said Michael Tonsellito, plaintiff's infant son.

5. Because said Court of Errors and Appeals erred in affirming the action of the said Circuit Court in overruling the question propounded by defendant's attorney to the witness James Tonsellito, as follows:

"Q. How late did he work that day?"

6. Because said Court of Errors and Appeals erred in affirming the refusal of said Circuit Court to charge the jury, at the request of the defendant, as follows:

"If the roadbed of the defendants at the place and time of the accident was similar in construction to the similar types of roadbed of other standard railroads in the locality, such as the Lehigh Valley Railroad, The Delaware, Lackawanna & Western Railroad and The

Pennsylvania Railroad Companies, and there was no greater distance from the roadbed itself to the top of the rails at the place and time of the accident than on such similar types of railroad, then no negligence can be attributed to defendant because of such distance then existing at such time and place of the accident."

7. Because said Court of Errors and Appeals erred in affirming the refusal of said Circuit Court to charge the jury, at the defendant's request, as follows:

"Plaintiff, Michael Tonsellito's damages in this case are
374 limited to legal compensation for his pain and suffering, the testimony being undisputed that plaintiff was not emancipated at the time of his alleged injury, and there being no proof in the case of any interference with plaintiff's earning capacity in the future because of said injury."

8. Because said Court of Errors and Appeals erred in affirming the refusal of said Circuit Court to charge the jury at defendant's request, as follows:

"If the jury believe that the condition of the defendant's roadbed at the time and place of the alleged injury to plaintiff, Michael Tonsellito, occurred (even though defective in the sense of the statute under which this action is brought, which of course is denied by defendant) was as plain and obvious to the said plaintiff as to the defendant and its agents, then plaintiff must be taken to have assumed the risks of his employment in this respect and cannot recover against the defendant on that phase of this action."

9. Because said Court of Errors and Appeals erred in affirming the action of said Circuit Court in ruling that there was evidence of defendant's negligence in the case, which should be submitted to the jury.

10. Because said Circuit Court should have directed a verdict at the close of the whole case, in favor of the defendant and against the plaintiff, on the ground that the clear weight of the evidence showed that the alleged injury to plaintiff's infant son, Michael Tonsellito, complained of by plaintiff, resulted from said Michael Tonsellito's own negligence and not from any negligence of the defendant; and that said Court of Errors and Appeals erred in affirming such action of said Circuit Court in refusing to so direct.

11. That said Circuit Court erred in not directing a verdict at the close of the whole case, in favor of the defendant and against the plaintiff, on the ground that the alleged injury to plaintiff's infant son, Michael Tonsellito, complained of by plaintiff, resulted from a risk of said Michael Tonsellito's employment which he assumed, and not from the negligence of the defendant, complained of by plaintiff; and that said Court of Errors and Appeals erred in affirming said action of said Circuit Court, in refusing to so direct.

375 12. Because said Court of Errors and Appeals erred in affirming the ruling and judgment of the Hudson County Circuit Court that a cause of action existed under the said Statute in favor of plaintiff for the injury to his infant son complained of.

13. Because said judgment of said Court of Errors and Appeals was against said defendant, the present plaintiff in error, whereas it

ould have been rendered in favor of said defendant, the present aintiff in error, which decision is against the title, right, privilege immunity of said defendant, the present plaintiff in error, set up id claimed by it under the statute of the United States, in both id Court of Errors and Appeals and said Circuit Court of the ounty of Hudson.

And the Plaintiff in Error prays that the judgment aforesaid may reversed, annulled and for nothing holden, and that said Court Errors and Appeals be directed to enter a judgment in said cause, versing and annulling the judgment of said Circuit Court of the ounty of Hudson.

VREDENBURGH, WALL & CAREY,
Attorneys of Plaintiff in Error.

Read on Application for writ of error, the 12th day of August, 915.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

376 & 377 [Endorsed:] 3199. Supreme Court of the United States. James Tonsellito, Deft. in Error, vs. The New York Central and Hudson River Railroad Company, Pl't'ff in Error. On Writ of Error. Assignments of Error. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J. Filed Aug. 14, 1915. Thomas F. Martin, Clerk.

378 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey, possessors of the record of the proceedings and judgment in an action at law in which James Tonsellito, is plaintiff-appellee, and the New York Central and Hudson River Railroad Company is defendant-appellants, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the Court of Errors and Appeals of the State of New Jersey, wherein final judgment upon return from the Circuit Court of the County of Hudson, in the State of New Jersey, was rendered on the eighteenth day of June, 1915, before you or some of you, said Court of Errors and Appeals being the highest court of law and equity of the said State of New Jersey in which a decision could be had in the action at law between James Tonsellito, plaintiff-appellee, and The New York Central and Hudson River Railroad Company, defendant-appellant, (wherein was drawn in question certain acts of the said parties which would or would not constitute interstate commerce, and the decision was in favor of such acts constituting interstate commerce and against a right, privilege or immunity especially set up and claimed therein by said plaintiff

in error under a statute of the United States), a manifest
379 error hath happened to the great damage of The New York Central and Hudson River Railroad Company, as by its complaint appears. We being willing that that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error *which* of right according to the constitution, laws, and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the twelfth day of August in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 3199. Supreme Court of the United States. James Tonsellito, Plaintiff, Defendant in Error, vs. The New York Central and Hudson River Railroad Company, Defendant, Plaintiff in Error. Writ of Error. Returnable September 11, 1915. Filed Aug. 14, 1915. Thomas F. Martin, Clerk. Vredenburgh, Wall & Carey, Attorneys for Plaintiff in Error, No. 1 Exchange Place, Jersey City, N. J.

380 To the Honorable the Supreme Court of the United States:

JAMES TONSELLITO, Plaintiff, Defendant in Error,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant, Plaintiff in Error.

On Writ of Error.

Prayer for Reversal.

And now comes The New York Central and Hudson River Railroad Company, plaintiff in error, and prays for a reversal of the judgment of the Court of Errors and Appeals of the State of New Jersey, and the judgment entered in the Circuit Court, Hudson County in said State, in the action brought by the above defendant in error against the above named plaintiff in error; and it also pra

that the order of said Court of Errors and Appeals entered in the office of the Clerk of said Court on the eighteenth day of June, 1915, ordering that the judgment of the said Circuit Court be in all things affirmed, and that the records and proceedings be remitted to said Circuit Court to be proceeded with in accordance with said order and judgment and the practice of said Court of Errors and Appeals, be reversed, as well as the judgment of said Circuit Court entered by the Clerk of said Court on the fourth day of November, A. D. 1914.

VREDENBURGH, WALL & CAREY,
Attorneys of Plaintiff in Error.

No. 1 Exchange Place, Jersey City, N. J.

[Endorsed:] 3199. Supreme Court of the United States. James Tonsellito, Plaintiff, Defendant in Error, vs. The New York Central and Hudson River Railroad Company, Defendant, Plaintiff in Error. On Writ of Error. Prayer for Reversal. Vredenburgh, Wall & Carey, Attorneys for Plaintiff, No. 1 Exchange Place, Jersey City, N. J. Filed Aug. 14, 1915. Thomas F. Martin, Clerk.

381 UNITED STATES OF AMERICA, *ss:*

To James Tonsellito, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the City of Washington, within thirty days from the date hereof, pursuant of a writ of error filed in the office of the Clerk of the Court of Errors and Appeals in the last resort in all causes, of the State of New Jersey, wherein the New York Central and Hudson River Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this twelfth day of August in the year of our Lord, one thousand nine hundred and fifteen.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

381½ [Endorsed:] 3199. Supreme Court of the United States. James Tonsellito, Defendant in Error, vs. The New York Central and Hudson River Railroad Company, Plaintiff in Error. On Writ of Error. Citation. Vredenburgh, Wall & Carey, Attorneys of Plaintiff in Error, No. 1 Exchange Place, Jersey City, N. J. Copy received of within citation acknowledged this 16 day of August, 1915. A. W. Simpson, Att'y, etc., Attorney of Defendant in Error. Filed Aug. 16, 1915. Thomas E. Martin, Clerk.

382 STATE OF NEW JERSEY.

[Vignette.]

Department of State.

JAMES TONSELLITO, Respondent,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that on the Sixteenth day of August, A. D. Nineteen hundred and fifteen, a copy of the foregoing Citation was duly lodged in my office in Trenton, in the State of New Jersey.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Twenty-sixth day of August, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

383 STATE OF NEW JERSEY.

[Vignette.]

Department of State.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that there was lodged with me as such Clerk, on August 16th, 1915, in the matter of James Tonsellito, Respondent, vs. The New York Central and Hudson River Railroad Company, Appellant,

1. The original Bond of which a copy is herein set forth.
2. Two copies of Writ of Error as herein set forth, one to file in my office.
3. Original Assignment of Errors.
4. Prayer for Reversal.
5. Citation.
6. Petition for Writ of Error.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Twenty-sixth day of August, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

384 STATE OF NEW JERSEY.

[Vignette.]

Department of State.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings, in the case of James Tonsellito, Respondent, vs. The New York Central and Hudson River Railroad Company, Appellant; and also the opinion of the Court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Twenty-sixth day of August, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

385 STATE OF NEW JERSEY.

[Vignette.]

Department of State.

JAMES TONSELLITO, Respondent,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Appellant.

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record of the proceedings in the within entitled cause, with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Twenty-sixth day of August, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

386 Supreme Court of the United States.

JAMES TONSELLITO, Plaintiff, Defendant in Error,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant, Plaintiff in Error.

On Writ of Error from U. S. Supreme Court to the N. J. Court of Errors and Appeals.

Stipulation.

It is stipulated by and between the attorneys for the respective parties hereto that the printed State of the Case used on appeal in the Court of Errors and Appeals of New Jersey, in the above cause, may be used by the Clerk of said Court of Errors and Appeals in making return to the Writ of Error from the Supreme Court of the United States in above cause, in so far as the records, pleadings, exhibits and other proceedings in said cause are contained therein.

August 30, 1915.

ALBERT C. WALL,
Attorney for Plaintiff in Error.
ALEX. SIMPSON,
Attorney for Defendant in Error.

387 [Endorsed:] 3199. Supreme Court of the United States. 625/24,908. James Tonsellito, Plaintiff, Defendant in Error, vs. The New York Central and Hudson River Railroad Company, Defendant, Plaintiff in Error. On Writ of Error from U. S. Supreme Court to the N. J. Court of Errors and Appeals. Stipulation. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J. Filed Sep. 2, 1915. Thomas F. Martin, Clerk.

388 [Endorsed:] File No. 24,908. Supreme Court U. S., October term, 1915. Term No. 625. The New York Central & Hudson River R. R. Co., Pl'ff in Error, vs. James Tonsellito. Stipulation as to record to be sent up by Clerk of Court of Errors and Appeals. Filed October 11, 1915.

389 Supreme Court of the United States.

JAMES TONSELLITO, Defendant-in-Error,
vs.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plaintiff-in-Error.

On Writ of Error.

Statement.

To the Honorable the Supreme Court of the United States:

The plaintiff-in-error states that it intends to rely upon all the errors set forth in its Assignment of Errors. The parts of the record which it thinks necessary for the consideration thereof, are:

(1) Writ of Error from the Supreme Court of the United States.
(2) Petition for writ of error.
(3) Assignment of errors.
(4) Prayer for reversal.
(5) Bond.
(6) Citation.
(7) Notice of appeal from Hudson Circuit Court.
(8) Grounds of appeal.
(9) Complaint.
(10) Amendment to complaint.
(11) Answer.
(12) Reply.
(13) Judgment of Hudson Circuit Court.
(14) Certificate of Judge of Hudson Circuit Court.
(15) Testimony.
(16) Motion for non-suit.
(17) Motion to direct verdict.
(18) Judge's charge in Hudson Circuit.
(19) State of the case.
(20) Exhibits P-1 to P-4 inclusive.
(21) Exhibits D-1 to D-8, inclusive.
(22) Opinion of the Court of Errors and Appeals.
(23) Check list.
(24) Judgment of Court of Errors and Appeals.

Dated October 15, 1915.

ALBERT C. WALL,
Attorney for Plaintiff in Error.

390 [Endorsed:] 625/24,908. Supreme Court of the United States. James Tonsellito, Defendant in Error, vs. The New York Central & Hudson River Railroad Company, Plaintiff in Error. On Writ of Error. Statement. Service of a copy of the within Statement is hereby acknowledged this — day of ——, 1915. Copy received Oct. 16, 1915. Alex. Simpson, Att'y Def't in Error. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J.

391 [Endorsed:] File No. 24,908. Supreme Court U. S., October term, 1915. Term No. 625. The New York Central & Hudson River R. R. Co., Pl'ff in Error, vs. James Tonsellito. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed October 20, 1915.

Endorsed on cover: File No. 24,908. New Jersey Court of Errors and Appeals. Term No. 240. The New York Central & Hudson River Railroad Company, plaintiff in error, vs. James Tonsellito. Filed September 9th, 1915. File No. 24,908.

Office Supreme Court, U. S.
FILED
JAN 3 1917
JAMES D. MAHER
CLERK

Brief of Plaintiff in Error.

Supreme Court of the United States.

October Term, 1916.

No. 240.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

Plaintiff in Error,

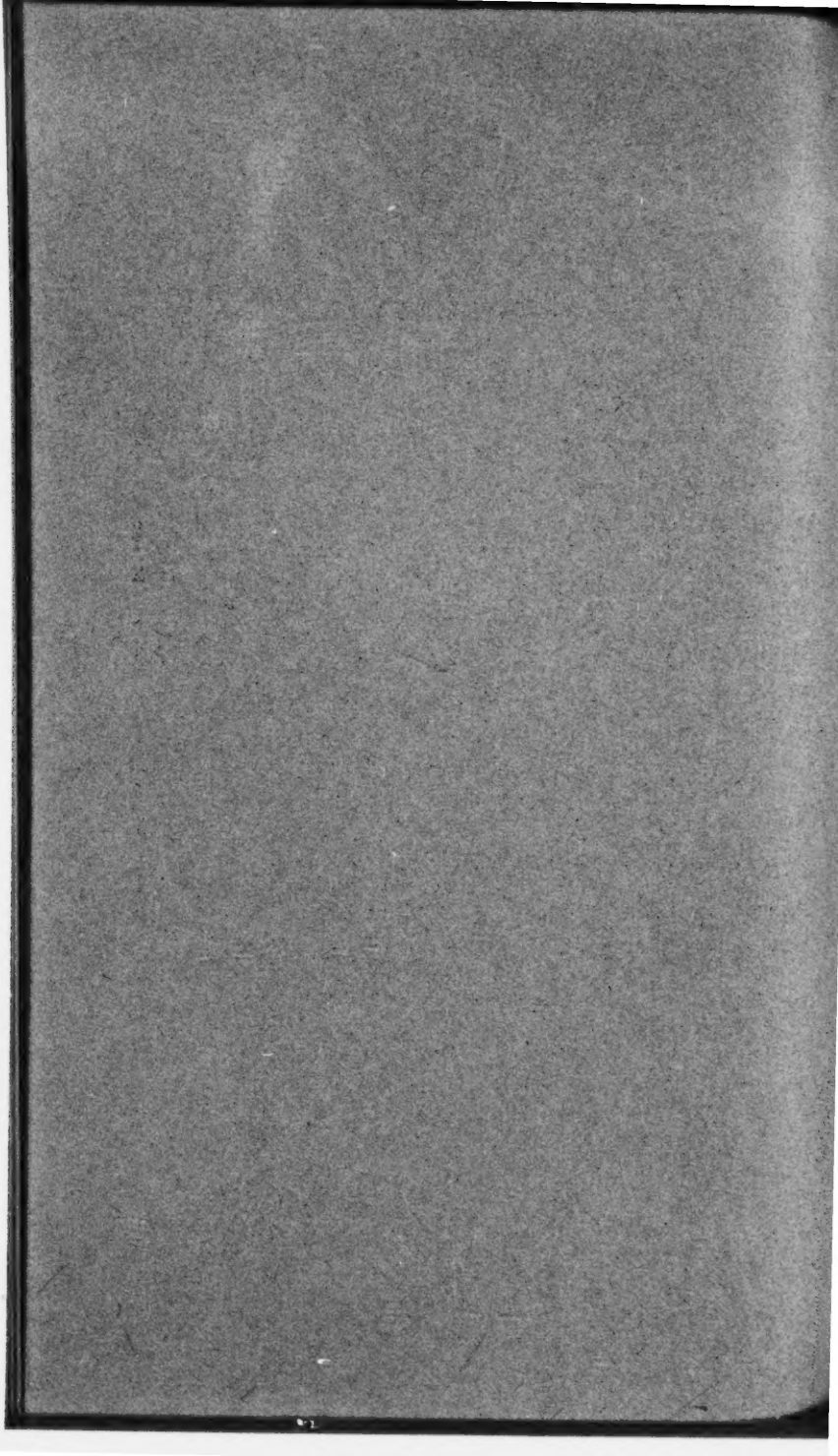
vs.

JAMES TONSELLITO,

Defendant in Error.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

John A. Hartpence,
ALBERT C. WALL,
Attorney and of Counsel with Plaintiff in Error.



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Supreme Court of the United States.

OCTOBER TERM, 1916. No. 240.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error,

vs.

JAMES TONSELLITO,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement of Case.

This is a proceeding on writ of error to the New Jersey Court of Errors and Appeals (which is the highest Court in New Jersey having jurisdiction of this cause), to review the judgment of that Court affirming the judgment of the Circuit Court of Hudson County, New Jersey, rendered in favor of the plaintiff (the present defendant in error), and against the defendant (the present plaintiff in error), for $1000. damages and $50.12 costs on November 14, 1914 (Record of Case No. 239, October Term, 1916, p. 15).

This case was tried with the case of The New York Central & Hudson River Railroad Company, Plaintiff in Error, against Michael Tonsellito, an Infant, who sues, etc. (No. 239, October Term, 1916), the two having been consolidated at the trial (Record No. 239, p. 16). The present case was brought by James Tonsellito, the defendant in error (hereinafter referred to as the plaintiff),

against The New York Central & Hudson River Railroad Company, the plaintiff in error (hereinafter referred to as the defendant), to recover damages for medical expenses for, and loss of services of, his minor son, Michael Tonsellito, resulting from injuries received in the accident which forms the basis of Michael's suit (No. 239, October Term, 1916). The father's suit is based also upon the Federal Employers' Liability Act, but he seeks to recover upon the common law right of the parent growing out of the injury to the minor child (Record No. 239, pp. 13, 14).

The facts and the questions involved, with one exception, are the same as in the case No. 239, inasmuch as primarily the father is not entitled to recover if the son is not.

Separate records, however, have been perfected on appeal to the Court of Errors and Appeals of New Jersey, and now on writ of error to this Court (See Records in Cases Nos. 239 and 240, October Term, 1916).

II.

Specification of Errors.

The assignments of error are found on pages 7-9 of the Record in Case No. 240.

But in the case of the father there is an additional assignment of error relied upon, namely:

> "12.—Because said Court of Errors and Appeals erred in affirming the ruling and judgment of the Hudson County Circuit Court that a cause of action existed under the said statute in favor of plaintiff for the injury to his infant son complained of."

Objection was also made to the Trial Court's charge that the father was entitled to recover if they found a verdict in favor of the son (Record No. 239, pp. 218, 221), and appropriate motions for non-suit (Record No. 239,

pp. 87-89), and for directed verdict for defendant (Record No. 239, pp. 209-211) were made, and were refused by the Court; and this action of the Circuit Court was affirmed by the Court of Errors and Appeals, as in the case of the son (Record No. 239, pp. 235-239; Record No. 240, p. 1).

III.

Brief of the Argument.

It is respectfully submitted that there can be no recovery in consequence of injuries inflicted on or suffered by an employe engaged in the inter-state commerce of his employer railroad under the Federal Act except under the statute itself; and that if it does not give a right of recovery, there is no remedy.

The Court of Errors and Appeals in its opinion (Record No. 239, pp. 238, 239), held that the intent of the Federal Act to exclude rights fixed by the common law was not clearly expressed, and hence sustained the Circuit Court in its rulings touching the right of the father to recover.

Reported in 94 Atl. Rep. 804.

See also

Nelson v. *Ill. Cent. R. R. Co.*, 155 N. W. Rep. (Iowa) 169, where a like result was reached.

But *contra*, in

Flanders v. *Ga. S. & F. Ry. Co.*, 67 So. Rep. (Fla.) 68.

We contend, however, that the Federal Act supersedes all former rights of action within the field that it covers, whether by statute or at common law, and that recourse must be had to the Act itself for the declaration of the right, if it exists. No right being given by that act to the

parent of a minor employe except in the case of death, no right exists in the parent in an action based upon the Federal Statute where injury alone results to the minor employe.

Seaboard Air Line v. *Horton*, 233 U. S. 492; 58 L. Ed. 1062;
Simpson v. *Shepard*, 230 U. S. 352; 57 L. Ed. 1511;
St. Louis &c. R. R. Co. v. *Craft*, 237 U. S. 648; 59 L. Ed. 1160;
So. Ry. Co. v. *Commission etc.*, 236 U. S. 439; 59 L. E. 661;
Toledo etc. R. R. Co. v. *Slavin*, 236 U. S. 454; 59 L. Ed. 671;
St. Louis R. R. Co. v. *McWhirter*, 229 U. S. 265; 57 L. Ed. 1179;
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St. L. & S. F. Ry. Co. v. *Seale*, 229 U. S. 156; 57 L. Ed. 1129;
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Garrett v. *L. & N. R. R. Co.*, 235 U. S. 308; 59 L. Ed. 242;
Mich. Cent. R. R. Co. v. *Vreeland*, 227 U. S. 59; 57 L. Ed. 417;
Am. R. R. Co. v. *Didricksen*, 227 U. S. 145; 57 L. Ed. 456;
Gulf etc. R. R. Co. v. *McGinnis*, 228 U. S. 173; 57 L. Ed. 785;
St. L. etc. Ry. Co. v. *Hesterly*, 228 U. S. 702; 57 L. Ed. 1031;
Thornton's "Federal Employers' Liability Act" (3rd Ed.) p. 34, secs. 19, 21, and notes.

Complete compensation is provided to the injured employe, and if he be a minor, the parent would doubtless

be entitled to that portion of the recovery flowing from the interference with earning power during minority. To allow the father also to recover in a separate action for loss of services of the minor, would be to give him double compensation. This cannot be the intention of Congress in enacting the Federal statute involved.

IV.

The judgment in favor of plaintiff in No. 240, October Term, 1916, should therefore be reversed, set aside and for nothing holden, for the reasons urged in the main brief in No. 239, and upon the further ground discussed in the present brief.

Respectfully submitted,

ALBERT C. WALL,

of Counsel with Plaintiff in Error.

Office Supreme Court, U. S.
FILED
JAN 27 1917
JAMES D. MAHER
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916
No. 240

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY

Plaintiff in Error

vs.

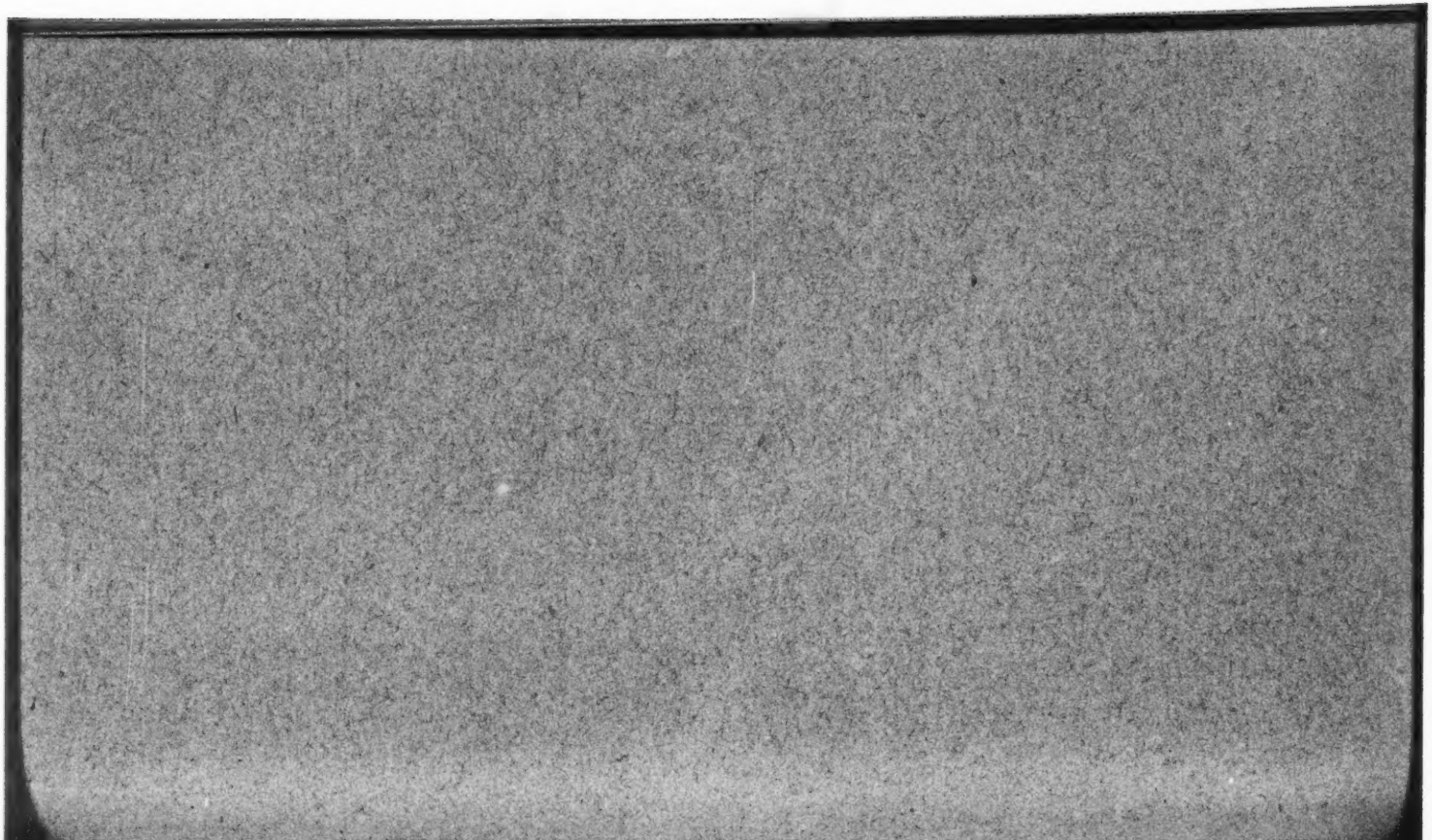
JAMES TONSELLITO

Defendant in Error

Brief of Defendant in Error

ALEXANDER SIMPSON
Attorney for Defendant in Error

THE ARTHUR H. CRIST CO., Cooperstown, N. Y.
New York City Office, 220 Broadway



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Supreme Court of the United States

OCTOBER TERM, 1916

No. 240

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plaintiff-in-Error, vs. JAMES TONSELLITO, Defendant-in-Error.	Error to the Court of Errors and Appeals of the State of New Jersey.

BRIEF OF DEFENDANT-IN-ERROR

Statement of Facts

The facts in this case are the same as in No. 239, except that this was an action by the father for the loss of services of his son. It is based on the common law negligence of the defendant and so dealt with by the Court of Errors and Appeals of the State of New Jersey.

The contention of the plaintiff-in-error is that the Acts of 1908 and 1910 under which suit for the son was brought, eliminate any common law action on the part of the father for damages.

Brief of the Argument

The recovery in this case was had by the father irrespective of this statute for the loss of services of his minor son. The action was not predicated upon the Act of Congress.

The Court of Appeals of New Jersey in deciding on this appeal said:

> "We do not construe the Federal Act as repealing, either expressly or impliedly, the father's right of action as it existed at common law. It purports to deal only with cases involving the death of the employee and in the absence of an intent clearly expressed or necessarily implied that Congress intended to take away by this corrective or remedial act, the legal status of third parties as fixed by the immemorial rules of the common law, we must assume that such legal rights do subsist unimpaired. The rule of construction is 'That an affirmative statute giving a new right, does not of itself and of necessity destroy a previously existing right.' *Broom's Legal Maxim,* p. 508; *O'Flarherty vs. McCowdall,* 6 H. L. cases, 137.
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> "So it is held the statutes which take away, change or diminish fundamental rights, statutory remedies for rights unknown to the common law and statutes which provide new and extraordinary remedies must be strictly construed both as to the cases mentioned within their terms and as to methods to be pursued. *36 Cyc.,* p. 1188, and cases cited."

This opinion of the Court of Appeals of New Jersey will be found in the 94th Atlantic Reporter, p. 805, entitled *Tonsellito vs. New York Central & Hudson River Railroad.*

The argument now is that this Court will say that because the Federal statute gave the minor an action in his own behalf, it by that very act took away something with which it did not deal—the action of the father under the common law, for injuries to his minor son. It is not denied that if Congress attempted to legislate on this subject, connected with interstate commerce, the legislation would be exclusive, but it has not attempted to legislate upon liability of interstate carriers to parents of persons

injured. It is simply legislation on the subject of liability to the person injured, or at his death, to his representative and beneficiary, but it has not attempted to legislate upon the subject of liability of carriers by railroad engaged in interstate commerce to the parents of minors employed by them. Therefore, the state law is not superseded. It is not until Congress legislates that its powers are paramount and exclusive.

See *Missouri Pr. Co. v. Cassel,* 224 U. S., 541, in which case it is held that unless Congress acted in the matter there was no repugnancy to the commerce clause of the Federal Constitution in the Nebraska statute governing contributory negligence of an employee of a railway engaged in interstate commerce.

The question here, it is submitted, is what is the construction of this statute? Does it legislate on the subject of recovery by a parent for minors? The rule for the construction of such statute as decided by the Court of Appeals of New Jersey is a strict construction and if that is made in this case, what can be read into the statute that would deny the recovery by a father for the loss of services of a minor child?

The cases cited in the brief of the plaintiff-in-error all go to the fact as to what the statute included, not what it excluded. The Trial Court did not charge, nor was there any exception to that portion of the charge, page 218 in the record, that because Michael could recover, his father must recover; but the charge was much more favorable to the defendant than it was entitled to, that if Michael could not recover under this act his father could not recover, and conversely charged that if Michael did recover, then his father might recover; not that he must recover, but that he might recover. In other words the charge was in favor of the defendant, charging that unless Michael could recover, his father could not recover, but charging that if Michael did recover, his father might also recover; not founding the liability upon the act, but stating that there was a permissive recovery on the part of the father, if the son did recover.

There was no exception taken to this part of the charge but the error heard here is the failure of the Court to direct a verdict against the father, because he could not recover under the Federal statute. The exception was to the language of the Court. There was no clear exception pointing out that the plaintiff-in-error thought that this put a recovery in favor of James, the father, upon the statute, but simply to the language of the Court. If this language of the Court could be construed so as to be without error, that should be done.

The plaintiff-in-error did not request the Trial Court to charge the jury that the plaintiff, James Tonsellito, has no action under the Federal Act, but did or did not have an action under the common law, but requested the charge that he had no action of any kind; and under the complaint which sets up simply the facts an action was embraced under common law. There was no direct appeal to the statute made in the complaint. Therefore, if the defendant-in-error, James Tonsellito, had any action, there was no error of the Trial Court in allowing that action to proceed to trial if it was not founded specifically upon the Federal statute. That it was the duty of the plaintiff-in-error to point out to the Court by specific objection any ambiguity in the language, see *Gerhardt vs. Boettger,* 75 N. J. Law, 916. The language of the Court was:

> "If, however, you find that your verdict should be for Michael, then you may find for the father."

This was not mandatory, but permissive. If ambiguous, the plaintiff-in-error should have requested a clearer charge.

Chess vs. Vockroth, 75 N. J. L., 665.

It is respectfully submitted that the judgment below should be affirmed.

ALEX. SIMPSON,
Attorney for Defendant-in-Error.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *v.* TONSELLITO, AN INFANT, ETC.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *v.* TONSELLITO.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

Nos. 239, 240. Submitted April 30, 1917.—Decided June 4, 1917.

In an action under the Federal Employers' Liability Act the questions whether plaintiff was engaged in interstate commerce when injured, whether the railroad was negligent, whether he assumed the risk, and whether he was a mere volunteer, will not evoke discussion by this court where there was adequate evidence upon them for submission to the jury, where there was no evident, material error in the charge, where both state courts below have sustained the judgment, and no special circumstances are present demanding comment.

The Federal Employers' Liability Act does not allow the father a right of action for expenses and loss of service resulting from his minor son's injuries in addition to the son's right of action.

The rights of action provided by the Federal Employers' Liability Act are exclusive as to the cases which it covers and no other can be added by the law of a State. *New York Central R. R. Co.* v. *Winfield*, *ante*, 147.

87 N. J. L. 651, affirmed in part and reversed in part.

THE case is stated in the opinion.

Mr. Albert C. Wall and *Mr. John A. Hartpence* for plaintiff in error.

Mr. Alexander Simpson for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

By stipulation, these causes were tried together before the same jury and upon the same testimony. Michael

Tonsellito, an infant seventeen years old, suing by his father, James Tonsellito, as next friend and relying upon the Federal Employers' Liability Act, obtained a judgment for personal injuries suffered while employed by plaintiff in error—Number 239. These injuries, he alleged, resulted from negligence in constructing and maintaining its road-bed and in starting a locomotive without giving him a reasonable opportunity to climb thereon. James Tonsellito recovered for himself on account of expenses incurred for medical attention to his son and loss of the latter's services—Number 240. Both judgments were affirmed by the Court of Errors and Appeals. 87 N. J. L. 651.

Reversal is asked in the cause instituted by Michael Tonsellito because (1) he was not engaged in interstate commerce when injured; (2) no negligence by the railroad was shown; (3) he assumed the risk; and (4) he was a mere volunteer when the accident occurred. We think there was adequate evidence to justify submission of all these matters to the jury; and we are unable to say the charge contains material error. Both state courts have sustained the judgment; there are no special circumstances demanding comment; and it seems enough to announce our conclusion. *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466; *Erie Railroad Co.* v. *Welsh*, 242 U. S. 303.

The Court of Errors and Appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions in *New York Central R. R. Co.* v. *Winfield ante*, 147, and *Erie Railroad Co.* v. *Winfield, ante*, 170. There we held the act "is comprehensive and, also, exclusive" in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. "It establishes a rule or regulation which is intended to op-

erate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive." Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State.

The judgment in Number 239 is

Affirmed.

In Number 240 the judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE BRANDEIS concurs in the result announced in No. 240.